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10 Cal.2d 467

**CHARLES F. HARPER CO. v. DE WITT
MORTGAGE & REALTY CO. et al.**

L. A. 16424.

Supreme Court of California.

Jan. 18, 1938.

As Modified Feb. 3, 1938.

1. Appeal and error ⇨1237

The sureties upon the bond given to stay execution pending appeal become parties to the original action only for the limited purpose of giving court jurisdiction to render and enforce judgment against them, since final judgment cannot be executed against them without further proceedings, and sureties are not entitled to notice of or participation in subsequent proceedings. Code Civ. Proc. § 942.

2. Appeal and error ⇨1237

A surety, by filing an undertaking upon appeal, consents that judgment may be entered against him on motion for amount of the judgment as affirmed, and the bond is in effect a stipulation for judgment. Code Civ. Proc. § 942.

3. Judgment ⇨73

Generally, consent to entry of judgment expires after payee's remedy becomes barred by limitations. Code Civ. Proc. §§ 337, 338, as amended by St.1935, pp. 1740 and 1673.

4. Appeal and error ⇨1237

The liability of a surety upon an appeal bond cannot be enforced by summary proceeding of judgment upon motion when action could not be maintained upon the bond itself, and same time limitation applies to each. Code Civ. Proc. § 942.

5. Appeal and error ⇨1237, 1239

As against sureties on appeal bond, neither the remedy of judgment upon motion nor the remedy of action upon the bond itself is exclusive. Code Civ. Proc. § 942.

6. Appeal and error ⇨1223

The obligation of sureties on appeal bond is upon the undertaking as an instrument in writing, rather than upon the judgment itself. Code Civ. Proc. § 942.

7. Limitation of actions ⇨47(3)

A proceeding by notice of motion to enter judgment against sureties on appeal bond, filed more than four years after remittitur affirming judgment appealed from was filed

in superior court, was barred by statute applicable to instruments in writing, as against contention that sureties became parties to original action and were liable as long as principal defendants were liable. Code Civ. Proc. § 942; § 337, as amended by St.1935, p. 1740.

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by the Charles F. Harper Company against the De Witt Mortgage & Realty Company and others. From an order denying plaintiff's motion to enter judgment against defendant John H. Blair and another, as sureties on an undertaking given to stay execution of judgment, plaintiff appeals.

Affirmed.

Prior opinion, 68 P.2d 1017.

Henry O. Wackerbarth, of Los Angeles, for appellant Charles F. Harper Co.

Porter & Sutton, of Los Angeles, for respondent John H. Blair.

E. O. Leake and J. J. Leake, both of Los Angeles, for respondent C. E. Rachal.

EDMONDS, Justice.

This appeal presents for review an order of the superior court denying a motion of the plaintiff to enter judgment against the sureties upon an undertaking given to stay the execution of a judgment directing the payment of money. The question for decision is whether the statute of limitations runs in favor of the sureties in such a case, and, if so, what period of time is to be applied.

The plaintiff brought action and recovered a money judgment. To get a stay of execution pending an appeal, the defendants filed an undertaking executed by John H. Blair and C. C. Rachal, the respondents here, in the form required by section 942 of the Code of Civil Procedure. Thereafter the judgment was affirmed, and a remittitur issued which was filed in the trial court on August 17, 1931. On June 26, 1936, the judgment not having been paid in full, the plaintiff served and filed notice of motion for the entry of judgment against the sureties on the undertaking. At the hearing, counsel for the respondents objected to the granting of the motion upon the ground that any claim against them was barred by the statute of

limitations, more than four years having elapsed from the date of the filing of the remittitur. This objection was sustained and the motion denied.

The appellant contends that by executing the undertaking the respondents became parties to the original suit and that the motion for judgment against them was a step in that action; not a new action or a special proceeding. From this premise it argues that as statutes of limitation only apply to actions or special proceedings and the summary remedy provided by statute for enforcing the obligation is neither of these, the plaintiff is entitled to have judgment entered upon its motion at any time during the five-year period within which an action may be brought upon its judgment against the defendants in the action. The sureties take the position that the motion is barred either under the four-year statute of limitation applying to "an action upon any contract, obligation or liability founded upon an instrument in writing," section 337, Code Civ.Proc. as amended by St.1935, p. 1740, or at the expiration of the three years fixed as the period of limitation "upon a liability created by statute, other than a penalty or forfeiture." Section 338, Code Civ.Proc.St.1935, p. 1673.

The undertaking executed by the respondents followed the requirements of section 942 of the Code of Civil Procedure and provides: "The said principals and said sureties, do further jointly and severally undertake and promise * * * that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the said defendants and appellants will pay the amount directed to be paid by the judgment * * * and all damages and costs which may be awarded against said appellants herein upon such appeal [and] that if the said appellants and defendants do not make such payment within thirty (30) days after the filing of the remittitur * * * in the court from which the appeal is taken, judgment may be entered upon the motion of said plaintiff and respondent, in its favor, against the undersigned sureties for such amount of said judgment, together with the interest that may be due thereon, and the damages and costs that may be awarded against said appellants upon the appeal."

[1-5] Although sureties upon such a bond became parties to the original action,

Hawley v. Gray Bros., etc., Co., 127 Cal. 560, 60 P. 437; Hogan v. Paddon, 91 Cal. App. 606, 267 P. 392, their position is not the same as that of the defendants. When the judgment becomes final it cannot be executed against them without further proceedings. They are not entitled to notice of subsequent steps in the proceedings and have no right to participate in them. By signing an undertaking upon appeal, a surety consents that judgment may be entered against him on motion for the amount of the judgment as affirmed, Gray v. Cotton et al., 174 Cal. 256, 162 P. 1019, and he becomes a party to the action for the limited purpose of giving the court jurisdiction to render and enforce a judgment against him, Meredith v. Santa Clara Mining Ass'n of Baltimore, 60 Cal. 617. In effect, the bond is a stipulation for judgment upon a certain contingency. The general rule is that a consent to the entry of judgment expires after the payee's remedy becomes barred by the statute of limitations, First National Bank v. Terry, 103 Cal.App. 501, 285 P. 336; First National Bank v. Mock, 70 Colo. 517, 203 P. 272, annotation, 21 A.L.R. 774, and the liability of a surety cannot be enforced by the summary proceeding of a judgment rendered upon motion when an action could not be maintained upon the bond. Neither remedy is exclusive, 3 Am.Jur. pp. 775, 776, but the same limitation of time applies to each.

[6,7] The obligation of the sureties is upon the undertaking, an instrument in writing, not upon the judgment. Liability upon such an undertaking accrues from the affirming of the judgment to which it relates and is barred four years thereafter. Crane v. Weymouth, 54 Cal. 476; Clark v. Smith, 66 Cal. 645, 4 P. 689, 6 P. 732; Howard Ins. Co. of New York v. Silverberg, C.C., 89 F. 168; section 337, Code Civ.Proc., as amended; 16 Cal.Jur. 483, 484. Notice of the motion to enter judgment against the sureties was given more than four years after the remittitur was filed in the superior court, and the motion was, therefore, properly denied.

The order is affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.

10 Cal.2d 458

EGAN v. STATE BAR OF CALIFORNIA.

S. F. 15874.

Supreme Court of California.

Jan. 12, 1938.

1. Attorney and client ⇨57

In proceeding to review a recommendation that an attorney be disbarred because of his misappropriation of a client's funds, client's unverified statement attached to petition for review to effect that restitution had been made was not a proper part of record.

2. Attorney and client ⇨46, 58

An attorney's personal economic difficulties will not excuse misappropriation of a client's funds, although the attorney's situation may be considered in mitigation of punishment in proper cases in discretion of body empowered to impose penalties.

3. Attorney and client ⇨58

An attorney who, under the stress of necessitous circumstances, had misappropriated about \$200 of a client's funds, but who was apparently not inherently dishonest and had not previously been accused of any dishonest acts in transactions with clients or others, was suspended from practice for one year.

In Bank.

Proceeding by George C. W. Egan, petitioner, against the State Bar of California, to review a recommendation of the Board of Bar Governors that petitioner be disbarred from the practice of law.

Petitioner suspended for one year.

George C. W. Egan, of San Francisco, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent State Bar.

PER CURIAM.

This is a proceeding to review a recommendation of the Board of Governors of the State Bar that petitioner, George C. W. Egan, be disbarred. The local administrative committee which heard the charges against him recommended suspension for one year. The examiner who conducted the hearing before the local committee filed a statement, in opposition to the recommendation of the committee, wherein he stated that in his view a reprimand and restitu-

tion would constitute the proper disciplinary action.

[1] Petitioner was charged with appropriating to his own use funds collected by him upon a judgment recovered by his client, Mary E. Sheehan, the complaining witness herein. Petitioner has at all times during this proceeding admitted the misappropriation. But he contends that the penalty recommended is "unfair, unjust and unwarranted." In his petition for the writ of review he states that no proceeding has ever before been taken against him by the State Bar, and that all moneys appropriated by him have now been repaid. He attached to the petition an unverified statement made by Mary E. Sheehan to the effect that full and complete restitution had been made to her. The date of restitution does not appear either from the petition for writ of review or from the statement of Mrs. Sheehan. At the time of the hearing before the local committee, the funds had not been restored. It is also set forth in Mrs. Sheehan's statement that petitioner has two minor children, who will be without support if he is permanently disbarred. Under our decision in *Allen v. State Bar*, 218 Cal. 19, 26, 21 P.2d 107, this statement is not properly a part of the record in this proceeding.

In 1931, at the time of the commission of the offense upon which this action rests, petitioner was forty-three years of age, and had been practicing law in this state for more than twenty-one years. The evidence presented at the hearing before the local committee related entirely to the offense charged. That is, petitioner made no attempt to develop facts relating to his previous record and career as a lawyer, with a view of influencing the committee in its recommendation as to disciplinary action in his case. *Allen v. State Bar*, supra.

The facts, as they appear from the record, are as follows: Petitioner was employed in October, 1931, by Mrs. Sheehan to collect a judgment she had recovered in the municipal court of San Francisco. He was to retain 25 per cent. of the amount collected as his fee. In October he accepted and receipted for a check, or checks, for the full amount due on the judgment, \$266.21. He informed Mrs. Sheehan that he had collected only \$75, and that the judgment debtor would make monthly payments. He paid her \$56, which is approximately three-fourths of \$75.

At the hearing before the local committee he claimed that two checks were sent in

payment of the sum of \$266.21 due on the judgment. He lost both checks, but subsequently regained possession of the larger of the two checks and collected it. The amount of the smaller check was never paid, according to petitioner, and the check was still outstanding. However, petitioner himself testified that this check was for only a small part of the \$266.21; the larger check being for about \$242. Of the amount collected, petitioner appropriated to his own use all but the sum of \$56, which he paid to Mrs. Sheehan.

Thereafter, in February, 1932, he paid Mrs. Sheehan \$37.50. This remittance was accompanied by a note to Mrs. Sheehan's husband as follows: "Jack: I expected to clear up that balance yesterday, but I also was disappointed. The 'wherewithal' may come in to-day or tomorrow. If it does I will send it out. I enclose you ck. for \$37.50. Please be patient. G. E."

Several months thereafter Mrs. Sheehan learned through the attorney who had represented her in the action in which she recovered the judgment in question that petitioner had collected said judgment in full. She confronted petitioner with this information. He then admitted that he had collected the judgment in full and spent the money. He promised to repay her. According to petitioner, it was satisfactory to Mrs. Sheehan that he should pay as he was able. The only other payments ever made by him were \$15 in December, 1932, and \$10 in January, 1933, making a total of \$118.50 repaid to Mrs. Sheehan of the sum of \$266.21 (or possibly a slightly lower sum) collected by petitioner.

The \$15 remittance was accompanied by a note in which petitioner said: "The other money of which I spoke to you about has not come in, but just as soon as it does I will send you half of it. * * * I will endeavor to send you more this week, and if not, not later than next Monday." With the \$10 payment of January, 1933, was a note in part as follows: "I will send you a check each week hereafter until the a/c is cleaned up. I am very, very sorry that this happened and trust that you will be a bit more patient with me."

Between this last payment in January, 1933, and the hearing of the proceeding against him by the local committee of the State Bar in February, 1937, petitioner made no further payments. As noted above, he states in his petition for review that he has now made full restitution. Whether

restitution was made before or after the local committee and the Board of Governors of the State Bar had made their recommendations of suspension and disbarment, respectively does not appear.

At the hearing before the local committee petitioner suggested that he had information that Mrs. Sheehan had expressed a willingness to leave town and remain away for a time (thereby absenting herself from the hearing of her charges against petitioner before the local committee) if a substantial sum of money was paid to her. He suggested that an investigator for the State Bar should contact Mrs. Sheehan and inform her that petitioner had made arrangements to pay her whatever was necessary "to get her out of town," with a view of ascertaining if she was still of the same mind. The committee refused to accede to this suggestion.

[2] We find nothing in the record which tends to show that petitioner is inherently dishonest or that he was ever before accused of any dishonest acts in his transactions with his clients or with others. The record indicates that petitioner, during the entire transaction and doubtless prior thereto, had been buffeted by a maelstrom of financial difficulties, which likely threatened his means of subsistence and that of those, if any, dependent upon him. These circumstances, whatever may have been their compelling power to drive him beyond the bounds of moral rectitude, are not recognized by the letter of the law as a defense to acts which are in their nature incriminatory. The circumstances in which an offense is committed may, however, be considered in mitigation of punishment in proper cases, in the discretion of the court or body empowered to impose penalties.

[3] In the instant case, Local Committee No. 5 of the State Bar in and for the City and County of San Francisco, by a unanimous vote, recommended the suspension of petitioner for a period of one year. The examiner for the committee, who conducted the proceeding, was of the view that a reprimand, upon restitution being made, would constitute proper disciplinary action. The Board of Governors of the State Bar, by a vote of nine to six, recommended disbarment. Petitioner's professional and business residence is the city of San Francisco. The recommendation of the local committee, which was in closer touch with the personal attributes of petitioner and the background of the case on the hearing than are we on

the record, has caused us to hesitate to award the extreme penalty provided by law. Especially is this so since the recommendation of disbarment made by the Board of Governors was by a nine to six vote.

The conduct of petitioner was highly censurable. It is largely with the hope that our order may have a sufficiently deterrent effect upon petitioner, and impress him with the necessity of keeping the record clear in the future, even under the stress of extremely necessitous circumstances, that we have concluded to impose the lesser penalty.

It is the order of this court that petitioner be and he is hereby suspended from the practice of the law in this state for a period of one year, effective thirty days after the filing of this order.



10 Cal.2d 463

**KINDRED v. PACIFIC AUTOMOBILE
INS. CO.**

L. A. 16377.

Supreme Court of California.

Jan. 17, 1938.

Rehearing Denied Feb. 16, 1938.

1. Insurance ⇨435

The words "regular and frequent use," as used in automobile liability policy which stipulated that regular and frequent use of commercial automobile described in policy should be confined to territory within 50-mile radius of place of principal garaging of automobile, meant the principal use as distinguished from casual or incidental use in the regular course of insured's business.

2. Insurance ⇨435

An accident occurring when insured was more than 50 miles from place of principal garaging of truck was not covered by commercial automobile liability policy providing that frequent use of truck should be confined to territory within 50 miles of regular place of garaging, where evidence disclosed that insured continuously used truck outside of the 50-mile radius.

3. Insurance ⇨311(1)

A party who was injured by truck which at time of accident was being operated out-

side of the terms of policy, requiring regular use of the truck to be within 50-mile radius from place of principal garaging, had no greater right than the insured.

4. Insurance ⇨648(1)

In action on commercial automobile liability policy which contained provision requiring regular use of truck to be within 50-mile radius of principal place of garaging, evidence that insured's employee made deliveries of fruit to point outside 50-mile radius was relevant when considered in connection with testimony of employee that while employed by insured he drove no truck other than truck causing plaintiff's injuries.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by Merial Kindred against the Pacific Automobile Insurance Company on a commercial automobile liability policy. From an adverse judgment, the plaintiff appeals. The defendant moves for dismissal of appeal.

Motion to dismiss denied, and judgment affirmed.

Prior opinion, 66 P.2d 1252.

Will H. Winston, of Long Beach, for appellant.

Finlayson, Bennett & Morrow, Henry L. Knoop, and John C. Morrow, all of Los Angeles, for respondent.

WASTE, Chief Justice.

The appeal herein was dismissed by the District Court of Appeal of the Second District, Division 2, for failure of appellant's opening brief to comply with certain requirements of rule VIII. A petition for hearing in this court was granted because of what appeared to be a too technical application of the rule. After the order of transfer was made, the rule was amended in such manner as no longer to authorize the dismissal of the appeal for violations thereof.

[1] Appellant's brief challenges the propriety of the trial court's action in admitting certain evidence and in directing a verdict for the defendant. It appears that plaintiff, in another action, recovered a judgment against the owner and operator of a Studebaker truck for damages alleged to have resulted from its negligent operation.

That judgment became final and, being unsatisfied, appellant commenced this action against respondent to recover on a policy of public liability insurance issued by respondent as insurer to the owner of the truck. The policy sued on contains a provision reading as follows: "In consideration of the reduced premium at which this policy is issued, it is agreed that the regular and frequent use of the commercial automobile described in the policy is and will be confined during the policy period to the territory within a 50 mile radius of the place of principal garaging of such automobile; and that no regular or frequent trips are or will be made during the policy period to any location beyond a 50 mile radius from the place of principal garaging of such automobile; that the assured does not and will not during the policy period advertise or solicit the hauling of goods, materials or commodities to a location beyond a 50 mile radius from the place of principal garaging of such automobile." Reasonably interpreted, the phrase "regular and frequent use," as employed in the quoted provision, means the principal use, as distinguished from a casual or incidental use, in the regular course of the assured's business.

The "policy period" began on July 5, 1935, and ended on July 5, 1936, and the place of "principal garaging" of the truck was designated in the policy as El Centro, Imperial county, Cal. The accident out of which plaintiff's damages arose occurred on August 14, 1935, in Tulare county. At the time, the truck was being there operated with the consent and by the direction of defendant's assured. The evidence discloses without conflict that during the year 1935 the assured was, and for several years prior thereto had been, engaged in the business of buying fruit from orchardists in Fresno and Kings counties and marketing it in Los Angeles; that at the beginning of the 1935 fruit season he moved the truck from El Centro, described in the policy as the principal place of garaging, to Fresno county; and that thereafter and until the date of the accident it was used principally and frequently, if not exclusively, in the regular course of the assured's aforesaid business. More specifically, the evidence establishes that the truck was used continuously in distributing empty boxes among various orchards in Fresno and Kings counties; in gathering picked fruit from said orchards and hauling it to Los Angeles. These several places were more

than 50 miles from the place of "principal garaging" of the truck.

[2, 3] This evidence was produced by the defendant, and plaintiff made no effort to controvert it. We are of the view that the evidence indisputably establishes that the assured, after the issuance of the policy and before the accident, so caused his truck to be operated as to do violence to that clause of the policy which restricted the "regular and frequent use" of the truck to the territory within a 50-mile radius of the place of "principal garaging." This being so, it follows that at the time of the accident the truck was being operated outside the terms of the policy and was not covered thereby. It is settled that, under such circumstances, persons injured by said truck, such as the appellant here, have no greater rights than the assured who, by reason of his operation of the truck outside the terms of the policy, obviously had no coverage thereunder. *Hynding v. Home Accident Ins. Co.*, 214 Cal. 743, 7 P.2d 999, 85 A.L.R. 13; *Purefoy v. Pac. Auto Ind. Exch.*, 5 Cal.2d 81, 53 P.2d 155; *Purcell v. Pac. Auto Ins. Co.*, 19 Cal.App.2d 230, 64 P.2d 1114; *Sears v. Ill. Ind. Co.*, 121 Cal.App. 211, 9 P.2d 245. This result follows, under the evidence in this case, whether the above-quoted provision of the policy be regarded as a warranty by the assured as to the operation of the truck, as an insuring agreement affirmatively defining the coverage, or as an exclusion or exemption clause. The state of the record and our conclusion thereon make it unnecessary for us to here characterize the provision. A determination thereof is principally relevant to the burden of proof but here, as we have stated, the defendant assumed and discharged the burden of proving that the truck, by reason of its "regular and frequent use" beyond the territory within a 50-mile radius of the place of "principal garaging," is without the coverage of the policy.

[4] We find no error in the rulings of the trial court with respect to the testimony of Young Kim, general manager of the K. & S. jobbers to whom the assured sold fruit in Los Angeles. His testimony that Tony Solano, the assured's employee, made six deliveries of fruit to the K. & S. Company in Los Angeles between July 29 and August 9, 1935 (all within the "policy period"), is pertinent and relevant when considered in connection with the testimony of said Solano to the effect that while employed by the as-

sured he drove no truck other than the one responsible for appellant's damages.

The motion to dismiss is denied, and the judgment is affirmed.

We concur: SHENK, J.; HOUSER, J.; SEAWELL, J.; EDMONDS, J.; LANGDON, J.; CURTIS, J.



24 Cal.App.2d 353

KOHL v. LYTLE CREEK WATER & IMPROVEMENT CO. et al.

Civ. 1695.

District Court of Appeal, Fourth District,
California.

Jan. 12, 1938.

1. Contracts $\S$ 170(1)

The practical construction placed on contract by parties sometimes furnishes strong evidence of what was intended by its terms.

2. Evidence $\S$ 397(1)

Generally, terms of written contract may not be varied by parol evidence.

3. Evidence $\S$ 419(1)

Where writing expresses a consideration which is not true consideration, actual consideration may be proved by parol evidence.

4. Evidence $\S$ 417(1)

Where writing does not purport to include all terms of parol contract, that writing does not bar proof of terms of contract not covered by writing.

5. Evidence $\S$ 450(5)

In action to quiet title to stock claimed by plaintiff under prior settlement entered into by parties, where writings, consisting of letters from parties' counsel to a title company and a deed and bill of sale of defendants to plaintiff, claimed by defendants to constitute a written contract, indicated that writings were executed to carry out terms of a contract not fully disclosed, evidence of parol agreement that plaintiff was to get stock as part of settlement was admissible.

6. Evidence $\S$ 448

Where writings leave terms of written contract uncertain or ambiguous, parol evi-

dence is admissible to remove uncertainty or ambiguity.

7. Frauds, statute of $\S$ 90(1), 95(1)

Personalty may be sold by a parol contract where there is payment and delivery.

8. Frauds, statute of $\S$ 90(2)

Where plaintiff was in possession of pledged water stock at time of parol agreement that stock was to become his property as part of a settlement with defendants, there was a sufficient delivery to constitute a sale of stock.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by O. H. Kohl against the Lytle Creek Water & Improvement Company, Raymond Carroll, and Alice C. Carroll to quiet title to thirty shares of the capital stock of the first-named defendant and to compel it to transfer the stock on its books and issue a new certificate to him, wherein the last two named defendants filed a cross-complaint. From an adverse judgment, the last two named defendants appeal.

Affirmed.

Allard & Whyte, of Pomona, and Duckworth & Harrison, of San Bernardino, for appellants.

Guthrie & Curtis and Swing & Swing, all of San Bernardino, for respondents.

MARKS, Justice.

Plaintiff brought this action against Raymond Carroll and Alice C. Carroll to quiet title to 30 shares of the capital stock of the Lytle Creek Water & Improvement Company and to compel that corporation to transfer the stock on its books and issue a new certificate to him. Plaintiff had judgment, and Mr. and Mrs. Carroll have appealed. We will hereafter refer to Mr. and Mrs. Carroll as the defendants and to the corporate defendant as the water company.

In 1922 plaintiff and Walter Kohl sold property to Raymond Carroll. Two notes in the principal sum of \$20,000 each, one payable to O. H. Kohl and the other to Walter Kohl, were executed by defendants. They were secured by a mortgage on 50 acres of the real property and a pledge of 50 shares of the capital stock of the water company which furnished irrigating water to the land. The Walter Kohl note was

paid, and 10 acres of the land together with 20 shares of the water stock were released from the lien of the mortgage and the pledge, leaving 30 shares of the water stock in the possession of plaintiff as a pledge as additional security for the unpaid note. The certificates were issued in the name of Raymond Carroll and were not indorsed by him.

As the note to plaintiff was not paid, he brought suit to foreclose the mortgage and the pledge. After negotiations between the parties, they effected, as they believed, a settlement of their differences. Plaintiff paid defendants \$3,500. He also released his mortgage and dismissed his action to foreclose the mortgage and his pledge. Defendants gave plaintiff a deed to the remaining 40 acres of the mortgaged property and a bill of sale to 10 shares of stock of the water company, 1200 smudge pots, 9000 gallons of fuel oil, 2 fuel oil storage tanks, and 6 smudge pot lighters. The 10 shares of water stock were part of the 20 shares released to defendants and were no part of the 30 shares in controversy here. Those 30 shares remained in the possession of plaintiff, as he believed they bore the indorsement of Carroll.

Several months after the settlement had been concluded, plaintiff took the certificates to the office of the water company to have new certificates issued to him. It was then discovered that they did not bear Carroll's indorsement. The water company refused to make the transfer, Carroll refused to indorse the certificates, and this action followed.

During the trial plaintiff was permitted to prove a parol agreement between the parties to the effect that the pledged water stock was to go to and remain the property of plaintiff as a part of this settlement. The strong preponderance of the evidence supports the findings of the trial judge that such parol agreement was made. Defendants maintain that their objections to the admission of this evidence should have been sustained as it tended to vary the terms of a written contract.

[1] The practical construction placed upon the contract by the parties also supports the view that plaintiff became the owner of the thirty shares of stock. He retained possession of the certificates, and defendants did not demand their return. By reason of these certificates, plaintiff obtained and used water to irrigate the land deeded to him by defendants. He paid the

assessments on the stock. Under some circumstances the practical construction placed on a contract by the parties to it furnishes strong evidence of what they intended by its terms. *Skousen v. Herz*, 135 Cal.App. 116, 26 P.2d 498.

It is clear that, if the evidence of the parol agreement was properly admitted, the judgment must be affirmed. If error was committed in these rulings, it must be reversed, as there is no other competent evidence to support the findings and judgment.

[2-4] It is a well-settled general rule that the terms of a written contract may not be varied by parol evidence. It is equally well settled that, where a writing expresses a consideration which is not the true consideration, the actual consideration may be proved by parol evidence. It is also well settled that, where the writing does not purport to include all of the terms of a parol contract, the writing is no bar to proof of the terms of the contract which were not covered by the writing.

A similar question was before the court in the case of *Weil v. California Bank*, 219 Cal. 538, 27 P.2d 904, 905, where it was said:

"This action was based upon an alleged oral agreement entered into shortly before the signing of the aforementioned letter and said acceptance, under the terms of which oral agreement the defendant undertook to pay to the plaintiff whatever profit it might realize from the deal after deducting its investment therein. * * *

"The trial court approved the position of the plaintiff, overruled the objection, received evidence of the parol agreement, found in the plaintiff's favor thereon, and entered judgment accordingly. The alleged error of the court in permitting proof of said oral agreement is the principal ground of the appeal.

"The question whether a writing is upon its face a complete expression of the agreement of the parties is one of law for the court. *Thoroman v. David*, 199 Cal. 386, 249 P. 513; *Harrison v. McCormick*, 89 Cal. 327, 26 P. 830, 23 Am.St.Rep. 469. The trial court interpreted the writing as not constituting the entire agreement of the parties by reason of the stipulation that certain expressed consideration was only 'a part of the consideration' for the deed. While the question is a close one, we are not prepared to say that the court's interpretation was not reasonably justified. At

least the use of the language in the contract may be said to be uncertain as to what constituted the entire consideration. This uncertainty is to be resolved and the language is to be construed most strongly against the defendant, whose officer prepared the agreement and caused the uncertainty to exist. *Payne v. Neuval*, 155 Cal. 46, 99 P. 476; 13 C.J., p. 5451; section 1654, Civ.Code. It is unnecessary, therefore, to discuss the argument of counsel on the question as to whether the case falls within the exception to the general rule, which exception authorizes, under certain circumstances, the proof by parol of consideration for an agreement. This case is governed by the rule that when the agreement does not express the entire agreement of the parties, and proof by parol of the additional consideration does not in any way defeat the legal operation of the agreement, such proof is admissible. See *Hendrick v. Crowley*, 31 Cal. [471], 472; *Arnold v. Arnold*, 137 Cal. 291, 70 P. 23."

Of similar import is *Linney v. Challacombe*, 118 Cal.App. 95, 4 P.2d 789, 790, where it was said: "The situation presented is one where a term of an oral contract may be looked to as expressing an agreement of the parties, even though there be a writing, because the writing either does not incorporate all the terms of the oral contract (*Buckner v. Leon & Co.*, [1928] 204 Cal. 225, 267 P. 693), or does not purport to supersede it as to those matters on which the writing is silent (*Whittier v. Home Sav. Bank*, [1911] 161 Cal. 311, 119 P. 92; *Greathouse v. Daleno*, [1922] 57 Cal.App. 187, 206 P. 1019)."

[5,6] The writings relied upon by defendants, as constituting the written contract, are: (1) A letter from defendants' counsel to a title company; (2) a letter from plaintiff's counsel to the same company; (3) the deed of defendants to plaintiff; (4) the bill of sale of defendants to plaintiff. It appears from the letter of plaintiff's attorney that there was an original order opening an escrow with the title company. No such order appears in the record.

The letter from defendants' attorney to the title company bears date of December 29, 1935, and is as follows:

"Mr. Guthrie of your city was to open with you an escrow covering a deal between his client O. H. Kohl and our clients Raymond Carroll and Alice Carroll. We hand you herewith the following documents for

deposit in that escrow; grant deed, bill of sale, two statements of identity, certificate for ten shares of stock in the Lytle Creek Water and Improvement Company together with an assignment thereof.

"You are authorized to use said documents when there is on deposit in said escrow for delivery to our clients at the close thereof the sum of \$3,500.00 and a release of all claim under a certain mortgage referred to in the deed enclosed herewith.

"You will also find enclosed certain papers in connection with the Raymond Carroll bankruptcy which you are to use for the purpose of clearing the title to the deeded property and effecting the purpose of the escrow. Such papers are not to be used until after the money has been actually deposited with you.

"If you desire further information in connection with this matter or desire additional instructions from our clients please call upon us. All expenses of the escrow are to be borne by Mr. Guthrie's client."

The letter from plaintiff's counsel to the title company is dated January 20, 1936, and is as follows:

"Referring to your order No. 125008:

"This is in shape to be closed. Pay Raymond Carroll, or order, \$3,500.00. Deliver deed covering land described in your preliminary report dated January 7, together with Bill of Sale which you have in your file, and certificate for ten shares of Lytle Creek Water and Improvement Company. Issue Policy of Title Insurance for \$15,000.00, subject to Notes numbered 1, 2, 3, 4, 5, 6, and 7, in your report of January 7.

"Bill O. H. Kohl for title escrow and recording fees."

The bill of sale is in the usual form and recites a consideration of \$3,000. The deed recites a consideration of \$500 and is in the usual form of a grant deed with the addition of the following:

"(This deed is an absolute conveyance, the grantors having sold land to the grantee for a fair and adequate consideration, such consideration, in addition to that above recited, being full satisfaction of all obligations secured by the mortgage executed by grantors to grantee as mortgagee, recorded in Book 389 of Mortgages, Page 350, Records of said County, and re-recorded in Book 293, page 205, Official Records of said County.

"Grantors declare that this conveyance is freely and fairly made, and that there are no agreements, oral or written, other than this deed between grantors and grantee with respect to said land.)"

We find nothing in these writings which purports to set out all of the terms of a contract between the parties. On the other hand, the writings would seem to indicate they were executed to carry out the terms of a contract not fully disclosed by the writings. Without some explanation, the terms of the contract could hardly be ascertained from the writings. Where writings leave the terms of a written contract uncertain or ambiguous, parol evidence is admissible to remove the uncertainty or ambiguity. 10 Cal.Jur. 938 et seq., and cases cited.

[7,8] Having reached the conclusion that the challenged evidence was properly admitted and that this evidence supports the findings to the effect that the 30 shares of water stock were sold and delivered to plaintiff and paid for by him, the judgment must be affirmed. Personal property may be sold by a parol contract where there is payment and delivery. In this instance payment was made and there was sufficient delivery, as the vendee was in possession of the stock at the time of the sale to him. *Wilson v. Hotchkiss*, 171 Cal. 617, 154 P. 1, L.R.A.1916F, 389, Ann.Cas. 1917B, 570.

The judgment is affirmed.

We concur: BARNARD, P. J.; JEN-
NINGS, J.



24 Cal.App.2d 434

**MESTRES v. CALIFORNIA MUT. BUILD-
ING & LOAN ASS'N et al.**

Civ. 10358.

District Court of Appeal, First District,
Division 2, California.

Jan. 19, 1938.

Building and loan associations ¶42(6)

Where superior court authorized building and loan commissioner to sell back to plaintiff realty which plaintiff had conveyed to building and loan association in liquidation and to accept in payment therefor approved claims against association having

cash surrender value of 45 per cent. of face value and authorized commissioner to pay liquidating dividend of 5 per cent. on all outstanding approved claims, commissioner had no power to accept from plaintiff in full payment claims on which dividend had been paid, and court had no power to compel conveyance by commissioner, since payment of dividends reduced face value of claims. St.1933, p. 1119, § 13.16a.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Suit by Clara Wilde Mestres against the California Mutual Building & Loan Association and others for specific performance to compel defendants to transfer to her certain realty. From a judgment for defendants, plaintiff appeals.

Affirmed.

John H. Thomsen and J. W. Lenahan,
both of Monterey, for appellant.

D. T. Jenkins, of San Jose, and Walter
Carrington, of Oakland, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued for specific performance to compel the defendants to transfer to her certain real property. The defense rested on the claim that the agreed purchase price had not been tendered. The defendants had judgment.

Prior to November, 1935, plaintiff owned certain real property on which defendant association held a first deed of trust which it had instituted proceedings to foreclose. About November 12, 1935, plaintiff deeded the property to defendant association and, contemporaneously with the delivery of the deed, signed an offer to repurchase the property for an agreed purchase price of approved claims against the association of \$22,300 face value. On November 27, 1935, defendant building and loan commissioner engaged in the liquidation of defendant association, accepted said offer to purchase, subject to approval of the superior court in which the liquidation proceeding was pending, and on December 2, 1935, petitioned said court for authority to make said sale. The petition came on for hearing, and on December 10, 1935, the court made its order authorizing the sale, wherein it directed: That 45 per cent. of the face value of approved claims against the association be fixed and determined as the cash surrender value thereof,

and that same be accepted upon that basis in payment for the property; that the commissioner was authorized to sell said real property to plaintiff and accept in payment therefor approved claims against the association having a minimum face value of \$22,300.

On the same day, December 10th, as the above order authorizing sale to plaintiff was made, the same court authorized defendant commissioner to pay a liquidating dividend of 5 per cent. upon all outstanding approved claims of the association, and on the next day, December 11th, the commissioner paid such liquidating dividend. On the claims used by plaintiff to purchase the real property the dividend amounted in the aggregate to \$935.12. On January 10, 1936, plaintiff tendered to defendant commissioner and association said approved claims, having a minimum face value of \$22,300, but without crediting, however, said dividend of \$935.12 paid thereon. Defendants refused the tender, lacking the \$935.12.

Appellant's theory is that the whole contract between the parties was contained in the offer to purchase of November 12, 1935, the acceptance of November 27th, conditioned upon court approval, the petition for an order authorizing the sale, and the order of authorization of December 10th. She contends that the demand thereafter for the \$935.12 was an attempt to rewrite the contract, and that her deposit of approved claims of \$22,300 face value was a "full compliance" of her obligation, entitling her to a deed to the property. According to appellant, when she learned of the order of December 10th approving the sale, she immediately contracted with brokers for the purchase thereof an amount of \$22,300 face value; the dividend checks had been prepared and dated as of December 2, 1935; and appellant contends that they were disbursed to strangers to the transaction.

Respondents argue that appellant fails to recognize the obvious fact that every payment of a liquidating dividend reduces the face value of the claim by just that amount and, this being so, the claims tendered by appellant were not the claims contracted to be tendered.

The trial court expressly found that: "Said 5% liquidating dividend was in truth and in fact a partial distribution of the assets of said Association in liquidation * * * that the payment of said 5%

liquidating dividend as aforesaid reduced the cash surrender value of all approved claims against said Association from 45% of the face value thereof to 40% of the face value thereof."

The rights of the parties are controlled by these principles: The respondent association was under process of liquidation, and hence the entire transaction is governed by the Building and Loan Association Act. Gen.Laws, Act 986, St.1931, p. 483. Section 13.16a of that act, added in 1933, St.1933, p. 1119, authorizes the commissioner to accept approved claims against any association in payment for real property of the association; such claims to be accepted "at their respective surrender values as estimated by the commissioner and fixed and determined by the court." Since the mode is the measure of the power, this mode must be deemed to have entered into the contract of the parties. It was so considered in the court order approving the sale wherein the cash surrender value was fixed at 45 per cent. of the face value of the approved claims which the commissioner was authorized to accept in payment for the property. If this was a qualified acceptance of appellant's offer, it was approved and consented to by her when she thereafter deposited the claims and demanded a transfer of the property to her. It is conceded that the payment of the "dividends" upon these particular claims reduced their cash surrender value to 40 per cent. Hence, the commissioner was without power to accept such claims in full payment, and the court was without power to grant appellant's prayer for specific performance and thereby require the commissioner to do an act which the law specifically forbade.

Some confusion seems to have arisen from the frequent use of the word "dividends" to describe the payments which were made pending the transaction. This term is commonly used to designate the share of profits to be apportioned among stockholders, as well as the portion of assets to be distributed to creditors. In the first sense the payment of the dividend, like the payment of interest, results in no reduction of the principal; in the latter sense the payment is more in the nature of an installment with a corresponding reduction of principal. Here the word was used in the latter sense and when these "dividends" were paid the face value of the claims was reduced in that amount. Hence, when the appellant tendered these

approved claims, their "face value" was just so much less than the sums indicated thereon. The fact that the commissioner had not had the opportunity to mark the reduction on the "face" of each claim is of no importance, since the appellant concedes that there is no issue of surprise, and no claim is established of mistake, lack of knowledge, or unfair practice.

The judgment is affirmed.

We concur: STURTEVANT, J.;
SPENCE, J.



24 Cal.App.2d 365

ARCULARIUS et al. v. CITY OF LOS ANGELES.

Civ. No. 5814.

District Court of Appeal, Third District,
California.

Jan. 13, 1938.

1. Municipal corporations ⇨1024

Under statute, a city instituting action is entitled, as a matter of right, to change of venue to a county other than that in which city is situated. Code Civ.Proc. § 394.

2. Municipal corporations ⇨1024

In action instituted by plaintiffs in county in which they owned land and did business, for injunction restraining city from appropriating water of river flowing over plaintiff's land, city's answer specifically denying appropriation of plaintiffs' water and praying that plaintiffs be compensated for any appropriation found by court to have been made, was not the beginning of a condemnation proceeding by the city, and plaintiffs did not have right to change of venue under statute providing for change of venue of action instituted by city to county other than that in which defendant resides or does business. Code Civ.Proc. § 394.

3. Pleading ⇨142

The prayer of an answer is not a part of the pleading.

4. Venue ⇨68

Plaintiffs instituting action against city in county in which they resided and in which land involved was situated were not entitled to a presumption that a fair and just

trial could not be had in that county, as respects their right to change of venue. Code Civ.Proc. § 392, subd. 1(a), as amended by St.1933, p. 1837, § 3.

5. Municipal corporations ⇨1024

Venue ⇨5(1)

A city's right under statute to have venue of action instituted in county in which plaintiffs resided and in which land involved was situated, changed to another county, did not give plaintiffs a right to change of venue. Code Civ.Proc. § 394, and § 392, subd. 1(a), as amended by St.1933, p. 1837, § 3.

Appeal from Superior Court, Mono County; Pat R. Parker, Judge.

Action for injunction by Frank H. Arcularius, also known as F. H. Arcularius, and another against the City of Los Angeles, a municipal corporation. From an order denying the plaintiffs' motion for a change of venue, the plaintiffs appeal.

Order affirmed.

David R. Faries, of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., J. M. Stevens, Asst. City Atty., Russell B. Jarvis, Deputy City Atty., Carl A. Davis, Deputy City Atty., and S. B. Robinson, Chief Asst. City Atty., all of Los Angeles, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

This action was begun by the plaintiffs to obtain an injunction against the defendants.

After the beginning of the action and the filing of the defendant's answer herein, two of the plaintiffs filed a motion for transfer of the action for trial from the county of Mono to some other county to be selected by the court. This motion was denied, and the plaintiffs, Frank H. Arcularius and Olive C. Arcularius, appealed from the order of the superior court denying their motion for a change of venue.

The plaintiffs allege in their complaint that they are the owners and in possession of certain real property in Mono county; that they have a right to the use of the waters of Owens river and its tributaries flowing across the property belonging to them, and pray that the defendants be enjoined from causing the pollution of streams flowing across appellants' lands from inter-

fering with underground waters and springs upon appellants' premises, and from interfering with, or diverting from their flow over the lands of the appellants, the waters of Owens river, its tributaries and springs; also, from constructing any tunnel under the premises belonging to the plaintiffs, and from constructing certain roads or highways.

The defendants filed an answer denying the allegations of the plaintiffs' complaint, and, in addition thereto, offered, if any of the rights of the plaintiffs had been invaded by the City of Los Angeles, or any of its officers, to make suitable compensation therefor; that if any of the waters of Owens river, belonging to the plaintiffs, had been taken by the defendants, that compensation therefor be made, and the title of the defendant city be quieted. After the filing of the answer by the defendants just referred to, the appellants filed a motion to transfer the cause of action to some county other than Mono as the place for trial. The motion contained the following allegations material to be considered:

"Said motion will be made and based upon the grounds that at the time of the commencement of this action Frank H. Arcularius and Olive C. Arcularius were, and they ever have been residents of the County of Mono, State of California, and in business in said county; that said City of Los Angeles is a municipal corporation situate in the County of Los Angeles, State of California; that the plaintiffs desire said action transferred.

"Said plaintiffs make this motion for change of venue under the provisions of Section 394 of the Code of Civil Procedure of the State of California. Said motion will be made upon this notice. The affidavit of McIntyre Faries, a copy of which is filed herewith, and the law applicable thereto."

The defendants introduced certain testimony to the effect that, at the time of the filing of the affidavit just referred to, both Frank H. Arcularius and Olive C. Arcularius had filed affidavits of registration showing that they were residents of the county of Inyo, and were persons entitled to vote therein. The record, however, shows conclusively that both of the plaintiffs just named were owning property and doing business in the county of Mono. Their business corresponded to the business mentioned in the cases of Finance and Con-

struction Co. of California v. City of Sacramento, 204 Cal. 491, 269 P. 167, and the case of Glide v. City of Sacramento, 204 Cal. 702, 269 P. 169.

Under subdivision 1(a) of section 392 of the Code of Civil Procedure, as amended by St.1933, p. 1837, § 3, which specifies that an action for injuries to real property should be brought in the county in which the real property is situate, it would appear from the allegations of the complaint that this action was instituted in the proper county. The motion, however, is based upon the second paragraph of section 394 of the Code of Civil Procedure, which reads: "Whenever an action or proceeding is brought by a county, city and county, or city, against a resident of another county, city and county, or city, or a corporation doing business in the latter, the action or proceeding must be, on motion of either party, transferred for trial to a county, or city and county, other than the plaintiff, if the plaintiff is a county, or city and county, and other than that in which the plaintiff is situated, if the plaintiff is a city, and other than that in which the defendant resides or is doing business or is situated."

[1-3] The law appears to be well settled that, if this action had been brought by the City of Los Angeles, the moving parties in this action would have been entitled to a change of venue as a matter of right under the provisions of the section just quoted. Based upon this premise, the appellants argue that they are likewise now entitled to a change of venue, even though they began their action in the county of Mono, in which they were either residents, or in which they were doing business, the theory of the appellants being that the action is really an inverse condemnation proceeding; and that the action has really been begun by the City of Los Angeles. This conclusion, however, appears to us to be illogical. We make this statement upon the allegations contained in the pleadings. The answer of the City of Los Angeles does not admit the taking of any property belonging to the plaintiffs. It specifically denies the appropriation of any property belonging to the appellants, but adds that, if such be found by the court to be the case, then that the court find that the taking has been for a public use, and that compensation be made therefor by the payment of damages, rather than the granting of injunctive relief. This is not the beginning of an ac-

tion; it is simply a defense to an action already commenced by the plaintiffs and pending in the county of Mono. Instead of being the beginning of an action, the answer in fact and in truth simply tenders an alternative relief to be granted to the plaintiffs. The prayer of the answer of course is no part of the pleading, but is simply a tender of relief and an offer to make compensation if the court finds that the defendant city has invaded any of the rights of the plaintiffs or appropriated any of the water rights belonging to the plaintiffs.

While the courts have used the word "inverse" where a property owner begins an action for damages to his property and also for injunctive relief, in contradistinction to an action based upon eminent domain proceedings, it does not alter the fact that the action has been begun by the property owner instead of by the city, based upon the law relating to eminent domain actions. It is simply the exercise of the equity powers of the court to conserve public uses and avoid the issuance of an injunction which would be detrimental to the public.

A number of cases have been cited approving the rule laid down in *Williams v. Merced Irrigation District*, 4 Cal.2d 238, 48 P.2d 664, to the effect that, where compensation can be made for the taking and appropriating of private property to a public use, an injunction will not be granted, and in these cases appear the use of the word "inverse" in determining the rights of the respective parties in the actions involved, and the compensation to be made, based upon the extent of the damages. In none of these cases, however, is the precise question passed upon which is presented for our consideration upon this appeal.

The reasons for granting a change of venue are very clearly set forth in an action entitled *City of Stockton v. Wilson*, 79 Cal. App. 422, 249 P. 835. The opinion, by Mr. Justice Finch, sets forth that the purpose of the statute is to give to a defendant an opportunity to have the cause tried in a neutral county where a suit is begun by a city; likewise, under certain conditions a change of venue may be had by either party, as where the law requires that an action shall be begun in a certain county

subject to a change of venue, as provided in section 394 of the Code of Civil Procedure.

[4, 5] Here, the action has been begun by the plaintiffs in the county where the land is situate, and where it is alleged that they are residents. From which it follows that under the reasoning contained in the case of the *City of Stockton v. Wilson*, supra, there can be no presumption that so far as the plaintiffs are concerned, a fair and just trial may not be had in the county of Mono; that the city might raise the question that the property being located in the county of Mono, and the plaintiffs, either residents or persons doing business therein, would perhaps be unduly favored by having the trial in Mono county, before either court or jury, is entirely outside of the question, as the *City of Los Angeles* is an outside party coming into the county of Mono, and allegedly interfering with the property and property rights of a resident, or of a person doing business in the county of Mono. That the city might have a right, under the section mentioned, to ask that the trial be had in a neutral county, where the plaintiffs would not be unduly favored, does not give to the plaintiffs a right to have the action tried in some other county than the one where they have elected to institute the same.

Having elected to institute the action in Mono county, the proper county for the trial of the action, and the Code provision not specifically granting the right to the plaintiffs for a change of venue, there appears in the record no substantial reason why we should read into the statute, by implication, something which was not incorporated therein by the Legislature. It must not be overlooked that the pleadings upon which the motion was made distinctly denies the taking of any property belonging to the plaintiffs, or the interfering with any of the rights possessed by the plaintiffs. The fact that the plaintiffs may be shown to be entitled to different relief from that which they have prayed for does not change the cause into an action begun by the *City of Los Angeles*.

The order of the trial court is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

24 Cal.App.2d 347

PEOPLE v. MILLER.

Cr. 1595.

District Court of Appeal, Third District,
California.

Jan. 11, 1938.

1. Criminal law $\hookrightarrow$ 996(1)

Where accused's attorney entered plea as to prior convictions, petition for nunc pro tunc order correcting minutes of conviction for purpose of having record show that no plea was entered by accused was properly denied.

2. Criminal law $\hookrightarrow$ 1081

Where defendant was not shown to have appealed from order denying nunc pro tunc order for correcting minutes of conviction, by announcing appeal in open court at time order was entered, or that he subsequently filed written notice of appeal, District Court of Appeal was without jurisdiction on alleged appeal.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Conrad Miller was convicted of an offense, and, from an order denying his petition for nunc pro tunc order correcting minutes of conviction, he appeals.

Dismissed.

Conrad Miller, in pro. per.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

PER CURIAM.

This cause is before us upon an alleged appeal from an order of the superior court

of San Joaquin county denying the defendant's petition for a nunc pro tunc order correcting the minutes of the defendant's conviction before said court in the year 1934. The purpose of the petition was to have the records of said court show that no plea was entered as to the prior convictions of the defendant.

This cause was before this court on a former appeal involving the question of a plea being entered as to the prior convictions by the defendant's attorney. The opinion in that case appears in 140 Cal.App. 241, 35 P.2d 229, in which this court held that the defendant had suffered no prejudice by reason of the manner in which said pleas were entered. A hearing in this case was denied by the Supreme Court.

[1] The record before us upon this alleged appeal corresponds exactly with the facts which were presented in the case just referred to. From which it appears that there is absolutely no merit in the defendant's present appeal. The defendant has no right to have the records corrected for the purpose of eliminating therefrom just what was done, and make it appear that something which was done was not done.

[2] In addition to the foregoing, the record before us does not show that the defendant either appealed from the order of the trial court by announcing such appeal in open court at the time the order appealed from was entered, or that he subsequently filed a written notice of appeal therefrom. It thus appears that this court in fact has no jurisdiction of the present alleged appeal.

The appeal therefore being absolutely without merit, and not being properly taken, is dismissed.

24 Cal.App.2d 408

PEOPLE v. DAVIS.**Cr. 3057.**

District Court of Appeal, Second District,
Division 2, California.

Jan. 17, 1938.

1. Burglary ☞41(10)

Evidence that accused approached within foot or two of bedroom window at 10 o'clock at night with hands upraised toward window, and was frightened away by police officer, was evidence of overt act directly proceeding toward consummation of crime of burglary, and sustained conviction of attempted burglary.

2. Burglary ☞45

In prosecution for attempted burglary, question whether accused, who was frightened from outside bedroom window at 10 o'clock at night, just as accused had hands upraised toward window, intended to commit larceny, was for jury.

3. Burglary ☞41(10)

In prosecution for attempted burglary, jury could infer that accused intended to commit larceny, from surrounding circumstances, and any other circumstances in evidence bearing upon the question.

4. Criminal law ☞531(3)

The proof of the corpus delicti of the crime of attempted burglary need only be prima facie to admit the confession of accused.

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Ernest M. Davis was convicted of attempted burglary, and he appeals from the judgment of conviction and from an order denying new trial.

Judgment and order affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen. and R. S. McLaughlin, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

Defendant was convicted of the crime of attempted burglary and appeals from the judgment and from the order denying him a new trial.

On the evening of August 28, 1937, at approximately 10 p. m., defendant was ob-

served in front of the bedroom window of an inhabited dwelling, into which he had no permission to enter, with his hands upraised towards the window. It was so dark that it could not be told whether or not he was actually touching the window. There were coats and purses on the bed in the room. The defendant was standing between a hedge and the house, a space only three or four feet wide. Defendant was asked what he was doing there. Instead of answering, he ran away, leaving his car parked across the street. After his arrest the defendant admitted that he had been at this house at the time in question. When the officer asked him, "Is it a fact that you were up there attempting to get into the window to obtain some purses that were in there?" defendant replied, "I have been a thief all my life. There is no use kidding you." He also admitted on the witness stand that at the time in question he took off his coat and vest and hid them and then went to where he had parked his car. But there was a crowd of people around it. He inquired what the commotion was about and was told, "They are after a burglar." He then left.

The defendant's chief contention is that the prosecution failed to prove the corpus delicti. In support of this proposition he stresses two points: (a) That his acts merely amounted to a preparation to commit the crime, and (b) that no felonious intent was shown.

[1] With regard to defendant's proposition (a), the evidence produced by the prosecution went much further than mere preparation and showed acts at the scene of the proposed crime which would have naturally resulted in the crime of burglary had the defendant not been scared away. For illustration, his approach within a foot or two of the bedroom window at 10 o'clock at night with his hands upraised toward the window. *People v. Gilbert*, 86 Cal.App. 8, 260 P. 558; *People v. Carter*, 73 Cal.App. 495, 501, 238 P. 1059. The crime of burglary is complete when a hand is passed through the window with felonious intent. *People v. Parker*, 119 Cal.App. 246, 250, 6 P.2d 82. Approaching the window and raising of the hands either to open it or to reach through it would clearly be an overt act directly proceeding toward the consummation of the substantive crime.

[2-4] With regard to the defendant's contention that there was no proof of intent to commit larceny, the intent with which an act is committed is ordinarily a

question of fact for the jury and may be properly inferred from the surrounding circumstances, *People v. Noon*, 1 Cal.App. 44, 81 P. 746; *People v. Carter*, supra, and any other fact and circumstance in evidence bearing upon the question. The courts in this state have repeatedly held that the proof of the corpus delicti need only be prima facie to admit the confession of a defendant. *People v. Gilbert*, supra; *People v. Maderos*, 108 Cal.App. 51, 290 P. 1075.

Judgment and order affirmed.

We concur: WOOD, J.; McCOMB, J.



McMANUS v. MONTGOMERY. *

Civ. 11611.

District Court of Appeal, Second District,
Division 2, California.

Jan. 12, 1938.

Hearing Granted by Supreme Court
March 10, 1938.

1. Assignments ⇨137

The assignee of a claim for attorneys' fees for services rendered by assignors to a wife in a separate maintenance action was entitled to recover from her the reasonable value of services and expenses of assignors, though she had testified in separate maintenance action, without being challenged or impeached, that she had made no agreement with assignors for attorneys' fees.

2. Appeal and error ⇨989

On appeal from judgment awarding attorneys' fees for services rendered in separate maintenance action, question for appellate court was whether there was any substantial evidence to sustain trial court's findings.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by B. W. McManus against Regina B. Montgomery for attorneys' fees for services rendered by plaintiff's assignors in a former separate maintenance action. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment affirmed.

75 P.2d—6

W. L. Baugh, Jr., Roy L. Herndon, and Meserve, Mumper, Hughes & Robertson, all of Los Angeles, for appellant.

Irvin C. Louis, H. B. Pool, and Mildred Gilmore, all of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from a judgment awarding, to the plaintiff, attorneys' fees for services rendered by the plaintiff's assignors in a former separate maintenance action.

Plaintiff's assignors, hereinafter referred to as the attorneys, represented the defendant in said former action in which an order to show cause for the payment of attorneys' fees was obtained upon an affidavit of the defendant alleging her poverty and the necessity of an award for attorneys' fees against the husband in order to enable her to prepare and prosecute her action, and it appears as a part of the evidence in the instant case that at the trial of that proceeding the wife was interrogated concerning her arrangements with her attorneys and testified as follows:

"By Mr. Butcher: Mrs. Montgomery, have you made any agreement with your counsel in effect that you would pay them for their services out of any property that might be assigned to you in this case by the Court? A. No.

"Q. Have you made any agreement with them in regard to counsel fees? A. No.

"Q. Have you obligated yourself to them in any manner, form or in any way, to pay them any attorneys' fees? A. No. That was never discussed at all."

No attempt was made by anyone to challenge or impeach her testimony in this respect at the trial of the separate maintenance action. In that action the trial judge awarded \$250 at one time and \$400 at another, but before the payment of the latter sum and before the findings of fact and conclusions of law were settled or signed, the attorneys were substituted out of the case and had no further opportunity to perform services for the defendant therein. The trial court found that the defendant and the attorneys had entered into an oral agreement under which the attorneys promised and agreed to render such legal services as were necessary to commence and prosecute the action and that an agreement was implied by law to pay the reasonable value for said services together with necessary monies expended by said attorneys for and on account of travel, which were incurred in

the maintenance of said action, and awarded judgment in the sum of \$2,185.28.

[1, 2] It is the contention of the defendant that under the circumstances the plaintiff is estopped to claim the existence of any contract, express or implied, between the attorneys and the client, and she relies almost entirely upon certain language used in the case of *Theisen v. Keough*, 115 Cal.App. 353, 1 P.2d 1015. The contention of the defendant is untenable. Our reasons are fully stated in the case of *Neblett v. Getty*, Cal. App., 66 P.2d 473, which case was very similar as to the facts of the instant case. The testimony of the defendant upon which she relies as above set forth is only a part of the evidence in the trial of the instant action. The defendant did not pay to the attorneys the \$400 which was awarded to her by the court and it was made clearly to appear that when she so testified she had no reference to the contract which is implied by law under the facts as above related. The issue of estoppel was not raised in the pleadings by the defendant. Upon this appeal the question for this court to determine is whether there is any substantial evidence to sustain the findings of the trial court, and in our view there is such evidence.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.



24 Cal.App.2d 372

BIRKHOFFER et al. v. KRUMM.

Civ. 2133.

District Court of Appeal, Fourth District,
California.

Jan. 13, 1938.

1. Appeal and error ⇐786, 1126

Where unsubstantiality of questions involved in appeal is apparent upon consideration of appellant's opening brief alone, motion to dismiss appeal or affirm judgment should be granted. Rules of the Supreme Court and District Courts of Appeal, rule 5, § 3.

2. Appeal and error ⇐801(5), 1127

Where unsubstantiality of questions involved in appeal cannot be determined from appellant's opening brief alone and examina-

tion of entire record is required, motion to dismiss appeal or affirm judgment should be denied. Rules of the Supreme Court and District Courts of Appeal, rule 5, § 3.

3. Appeal and error ⇐801(5), 1127

Where grounds of motion for dismissal of appeal or affirmance of judgment could not be determined without an examination of record, and appellant had stated insufficiency of evidence as one of grounds of reversal and had argued questions of law in opening brief upon which respondents should submit authorities to aid in decision, motion to dismiss appeal or affirm judgment was denied. Rules of the Supreme Court and District Courts of Appeal, rule 5, § 3.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Suit by Oscar Birkhofer and others against Theodore Krumm. Judgment for plaintiffs, defendant appealed, and plaintiffs filed a motion to dismiss the appeal or affirm the judgment.

Motion denied.

Theodore G. Krumm and R. Bruce Findlay, both of San Bernardino, for appellant.

U. F. Lewis, of Redlands, and Ernest Clewe, of San Francisco, for respondents.

MARKS, Justice.

This is a motion, made under the provisions of section three of rule V, Rules of the Supreme Court and District Courts of Appeal, to dismiss the appeal or affirm the judgment on the grounds (1) that the appeal was taken for delay only, and (2) that the questions on which the decision of the case rests are so unsubstantial as not to need further argument.

Shortly after the effective date of the rule, July 1, 1932, this court announced its policy on motions of this kind, as follows:

[1, 2] "Unsubstantiality of questions involved in the appeal is made the principal ground for invoking the power of an appellate tribunal, wherein the appeal is pending, to dismiss such appeal or to affirm the judgment or order from which the appeal is taken. If this unsubstantiality is apparent upon consideration of appellant's opening brief alone, invocation of the power to dismiss an appeal or to affirm a judgment is manifestly proper and in strict

conformity with the obvious purpose of the rule, viz.: The more rapid disposition of appeals. If, however, consideration of appellant's opening brief, together with the assistance furnished by the argument of counsel for respondent and the points and authorities filed in support of the motion to dismiss, does not enable the appellate court to arrive at a decision that the appeal lacks merit, and final decision of the motion requires examination of the entire record, a different problem is presented. The logical effect of the latter procedure will be to make of the motion to dismiss, in reality, a motion to advance, on the calendar of the appellate court, appeals there pending. A second and not less important effect produced thereby is that in all cases where the motion to dismiss or to affirm is denied the reviewing court will be required twice to examine the entire record. While the expeditious disposal of appeals is a 'consummation devoutly to be wished for', the adoption of a policy with respect to the rule under consideration, whose effect will be, in many instances, to double the labors of the reviewing court and materially to increase the time required for examination of appeals, may well defeat the very end desired. It is, therefore, our opinion that when it can be determined from appellant's opening brief alone that the questions involved in the appeal are so unsubstantial as to require no further elucidation, a motion of the character here considered should be granted. If, however, in the ordinary case, the unsubstantiality cannot be thus determined and an examination of the entire record is required for such determination, a motion to dismiss or affirm the judgment should be denied."

We have since adhered to the policy thus announced. *City of Los Angeles v. Los Angeles-Inyo Farms Co.*, 126 Cal.App. 61, 14 P.2d 339; *Thompson v. Boyer*, 127 Cal. App. 149, 15 P.2d 541; *Nelson v. National Guar. Life Co.*, 128 Cal.App. 341, 17 P.2d 155; *Inga v. Blum*, 132 Cal.App. 15, 22 P.2d 34; *North v. Evans*, 136 Cal.App. 434, 28 P.2d 938; *Lennon v. Woodbury*, 1 Cal.App.2d 381, 36 P.2d 415; *Barr v. Hall*, 9 Cal.App.2d 426, 49 P.2d 1124; *Butcher v. Thornhill*, 10 Cal.App.2d 666, 52 P.2d 509; *Rasmussen v. Fresno Traction Co.*, 11 Cal.App.2d 357, 53 P.2d 1038; *Hall v. Wolford*, Cal.App., 71 P.2d 596.

[3] Respondents in their brief on this motion urge the following two grounds, among others, to support the motion:

"1. Appellant's brief states and relies upon 'as facts' some matters as to which there are no findings but as to which the evidence is conflicting and others on which there are findings precisely contrary to his contentions. And the sufficiency of the evidence supporting these findings is not attacked.

"2. The brief fails to 'show that any injustice has been done (appellant) or that (his) appeal was based on any substantial error of the trial court'."

It is evident that to determine these contentions we must make an examination of the record. Furthermore, appellant states and argues as one of his grounds of reversal of the judgment the insufficiency of the evidence to support the findings and judgment. A determination of this question also requires an examination of the transcripts.

Appellant, in his opening brief, also argues questions of law upon which respondent should submit authorities to aid the court in the decision of the case.

The motion is denied.

We concur: BARNARD, P. J.; JENNINGS, J.



24 Cal.App.2d 375

SOMMERS et ux. v. VAN DER LINDEN

et al.

Civ. 1998.

District Court of Appeal, Fourth District,
California.

Jan. 13, 1938.

Hearing Denied by Supreme Court

March 14, 1938.

1. Automobiles ⇨184

Under statutes providing for licensing of minor automobile operators and imposing vicarious liability upon parents, parents were not liable for injuries caused by minor son two years after expiration of license, as against contention that liability did not expire with license. St.1929, p. 522, § 62(a, b); p. 523, § 69.

2. Automobiles ⇨242(6)

Under statutes imposing vicarious liability upon parents for negligence of minor child in driving automobile with consent of parents, to impose liability upon parents, it

must be shown that they had custody of minor child, and that they had given minor express or implied permission to drive automobile by the negligent operation of which injuries were caused. St.1929, p. 522, § 62 (c).

3. Automobiles ⇨244(24)

Evidence that parents, who had signed license of minor son, had seen minor son driving automobiles of other people and had not forbidden practice, and that minor was occasionally permitted to drive family automobile, without showing that parents had express knowledge that minor son drove automobiles of third persons, *held* insufficient to warrant finding that son had implied permission to drive automobile of third person for the negligent operation of which parents would be liable. St.1929, p. 522, § 62(c).

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Action for damages for personal injuries sustained in an automobile collision by Nicholas Sommers and wife against R. G. Van der Linden and others. Judgment against defendants Joe Durrer and Remy Van der Linden, and from judgment dismissing action as to defendants R. G. Van der Linden and Bertha Van der Linden, plaintiffs appeal.

Affirmed.

Harry W. Horton, of El Centro, for appellants.

Clarence B. Smith, of El Centro, for respondents.

JENNINGS, Justice.

The plaintiffs, husband and wife, instituted this action against the defendants to recover damages for personal injuries sustained by them as the result of a collision which occurred on September 5, 1933, between the automobile in which they were riding and an automobile which was then being driven in an allegedly negligent manner by the defendant Remy Van der Linden. It was alleged that the automobile which the last-mentioned defendant was driving was the property of the defendant Joe Durrer and that Van der Linden was driving said automobile with the knowledge and consent of the owner. It was further alleged that Remy Van der Linden was a minor at the time the collision occurred and that he had there-

fore procured from the motor vehicle department of the state of California an operator's license which entitled him to operate a motor vehicle on the public highways of the state and that the defendants R. G. Van der Linden and Bertha Van der Linden were the parents of Remy Van der Linden and had signed their son's application for such operator's license and had thereby agreed that they would be responsible for any damages that might be sustained by any person as a result of the negligent operation of a motor vehicle by said minor.

Upon the trial of the action when the plaintiffs had concluded their case and had rested, the defendants moved the court for a nonsuit. The motion was granted as to the parents of the minor and denied as to the two remaining defendants. Upon the termination of the trial judgment was rendered in favor of plaintiffs against the defendants Joe Durrer and Remy Van der Linden and a judgment dismissing the action as to the defendants R. G. Van der Linden and Bertha Van der Linden was entered. This appeal has been taken by plaintiffs from the judgment of dismissal.

Appellants contend that the court erred in granting the motion of respondents for a nonsuit. This contention is based on section 62 of the California Vehicle Act, St.1923, p. 532, § 62, as amended by St.1929, p. 522, as it existed on September 5, 1933, the date of the collision and particularly the provisions contained in subdivisions (b) and (c) of said section. Intelligent consideration of this contention requires some reference to the facts which were developed by the evidence which had been produced by appellants when the motion for a nonsuit was granted.

The record on which this appeal is presented consists of the reporter's transcript of only a portion of the evidence submitted during the trial. It contains the testimony given by the defendant Remy Van der Linden and by his parents, respondents herein. Included in it are two exhibits which were introduced in evidence by respondents and their codefendants. One of these exhibits is a certified copy of the application of the defendant Remy Van der Linden for an operator's license. The other is a copy of a telegram addressed to the counsel who represented the defendants during the trial of the case purportedly sent by the state of California, division of drivers licenses and

adjustments, on December 11, 1934. By these exhibits it was shown that the defendant Remy Van der Linden made application for the issuance to him of a license to operate motor vehicles in the state of California on July 25, 1929, that he was then 16 years of age, that his parents, respondents herein, signed the application, that the application was granted and an operator's license was accordingly issued to the applicant on August 23, 1929, and that the license so issued expired two years after the date of issuance. Remy Van der Linden testified that he had not made application for an operator's license at any time subsequent to August, 1929.

The testimony of the respondents which is contained in the reporter's transcript related largely to the knowledge or the lack thereof of the parents that the minor, defendant Remy Van der Linden, was driving automobiles of other persons and their consent, express or otherwise, that he might drive the automobile which respondents owned. A fair résumé of this testimony is that respondents at times permitted their son, Remy, to drive the family automobile and at other times refused permission and that they informed him that he could only drive the car with their express permission. With respect to the matter of their knowledge or lack of it that he, at times, operated automobiles which belonged to persons other than themselves, both respondents testified positively that they had given him no permission to drive such cars and each denied knowledge that the minor was so driving, and in particular that either of them had seen him driving the automobile which belonged to the defendant Joe Durrer. Bertha Van der Linden testified that at various times during the year 1933 she had observed her son, Remy, riding in automobiles of other persons. The testimony of both respondents indicated that neither of them had expressly directed the minor that he should not drive an automobile which was the property of a third person.

On this state of facts appellants urge that liability for the injuries which they sustained attached to respondents and that the trial court therefore erred in granting a nonsuit. It is first contended that respondents became liable because they joined in the application which their son, Remy, made for an operator's license on July 25, 1929, notwithstanding the fact that the license which was issued to the minor

on August 23, 1929, in response to the application signed by the parents, expired two years after the date of its issuance, the date of expiration thus being more than two years prior to the date on which the collision occurred.

[1] The contention that the legal liability of the parents for the minor's negligence continued beyond the date on which the license expired is not persuasive. Appellants maintain that this far-reaching liability was imposed upon respondents by the provisions of subdivision (b) of section 62 of the California Vehicle Act, as amended by St.1929, p. 522, which was in effect at the time the collision occurred. This subdivision then contained the following language: "Any negligence of a minor in driving a motor vehicle upon a public highway shall be imputed to the person or persons who shall have signed the application of such minor for said license." Subdivision (a) of the same section provided that "The application to the division of any minor for an operator's license shall not be granted unless such application is signed by both the father and mother of the applicant if both the father and mother are living and have custody of the applicant." It is apparent that the primary purpose of the application thus required to be made and signed was for the issuance of an operator's license and for the kind of operator's license which the law then in effect permitted to be issued. However, the act of which section 62 was a part did not permit the issuance of a license of unlimited duration. On the contrary, the period of time during which such a license should continue in effect was expressly limited and the license automatically expired two years after the date of issuance. Section 69, Cal. Vehicle Act, Stats.1929, p. 523. When, therefore, the application in which respondents joined was made it was not for an operator's license of unlimited duration. It was not an application for a license that would continue in effect, for example, throughout the minority of the applicant. Conceivably, respondents might not have been willing to sign an application for such a license having in mind the more extended liability which they would incur by so doing. Since the primary purpose of the application required to be made by the provisions of subdivision (a) of section 62 of the act was for the issuance of a license which the statute ordained should automatically expire two years after the

date of issuance, we are impelled to the conclusion that the vicarious liability imposed by subdivision (b) of the aforementioned section ended when the license expired.

The second contention of appellants is that, in any event, liability for the minor's negligence and the injuries caused thereby attached to respondents under the provisions of subdivision (c) of section 62 of the statute. At the time the accident occurred subdivision (c) contained the following language: "Also any negligence of a minor, whether licensed or not under this act, in driving a motor vehicle upon a public highway with the express or implied permission of a parent or parents having custody of such minor, shall be imputed to such parent or parents, who shall be jointly and severally liable with such minor for any damages caused by such negligence, except in the event the minor is driving a motor vehicle as the agent or servant or upon the business of a person other than the parent or parents."

[2] From the above-quoted language it is apparent that it was incumbent upon appellants, in order to fasten liability upon respondents for the minor's negligence, to establish two necessary facts. These facts were, first, that at the time the collision occurred respondents had custody of the minor and, second, that they had given to the minor their permission, either express or implied, to his driving the automobile by the negligent operation of which the injuries were caused. For the purposes of this opinion it will be assumed that the first of the above-stated facts was established although it must be observed that it is not certain from the very meager evidence relating thereto which appears in the transcript that such was the case.

[3] With respect to the second necessary fact, it is clear that not an iota of evidence was produced which tended to show that respondents had ever given their express permission to the minor to drive the automobile which the evidence showed he was driving when the accident occurred. To the contrary, the evidence indicated an entire absence of such express permission. It is, however, urged that the evidence tended to show that the driving

of the car by the minor took place with the implied permission of respondents. The facts established by the testimony of respondents upon which reliance is placed to make out implied permission are that the mother had seen the minor riding in automobiles of other persons, that neither respondent had forbidden the minor to drive an automobile which belonged to a third person, and that the minor was occasionally permitted by respondents to drive the family automobile. The last-mentioned fact is of no assistance to appellants because the uncontradicted evidence showed that the minor was allowed to drive the family car only when he obtained the express consent of his parents so to do. It is also our conclusion that the two remaining facts were entirely insufficient to show implied permission. Certainly the fact that one of the parents had observed the minor riding in automobiles of third persons would not alone justify an inference that respondents impliedly consented to the minor's driving any such automobiles. Nor do we think that the additional fact that neither parent ever expressly forbade the minor's driving an automobile of a third person would serve to warrant an inference of implied permission, particularly in view of the uncontradicted evidence that neither parent had any knowledge that the minor ever drove an automobile of a third person and in view also of similar evidence negating knowledge by respondents that the minor had ever driven the particular automobile which he was operating when the collision occurred. At least a knowledge by the parents that the minor had driven automobiles of third persons in the past was required to warrant an inference of implied permission under the facts disclosed by the record herein. *Bradford v. Sargent*, 135 Cal.App. 324, 27 P.2d 93; *Howland v. Doyle*, 6 Cal.App.2d 311, 44 P.2d 453. Since the necessary factor of knowledge was entirely lacking, an inference of implied permission was unwarranted.

For the reasons stated herein, the judgment from which this appeal has been prosecuted is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

24 Cal.App.2d 349

BANK OF PERRIS v. SANDOR et al.

Civ. 2120.

District Court of Appeal, Fourth District,
California.

Jan. 12, 1938.

1. Chattel mortgages ⇨19

A mortgage may include both realty and personalty.

2. Chattel mortgages ⇨19

A chattel mortgage was not rendered invalid as between the parties because it included a Diesel engine and a pump which allegedly were fixtures attached to realty.

3. Pleading ⇨291(2)

The genuineness and due execution of a release was admitted, under statute, where release was attached to answer to cross-complaint and cross-complainants failed to deny the genuineness and due execution. Code Civ.Proc. § 448, as amended by St.1933, p. 2548, § 2.

4. Compromise and settlement ⇨23(3)

In suit to foreclose chattel mortgage wherein a compromise was effected and mortgagors thereafter filed a cross-complaint alleging fraud of plaintiff, evidence sustained finding that mortgaged property had been delivered voluntarily to mortgagee by mortgagors and sold by mortgagee at prices approved by mortgagors and all money except that paid to or taken by mortgagors had been credited on debt, that parties had effected a complete, valid compromise, and that there was no fraud as alleged by mortgagors.

5. Chattel mortgages ⇨283

In proceeding to foreclose chattel mortgage wherein parties effected a compromise and mortgagors thereafter filed a cross-complaint alleging fraud of mortgagee, findings supported judgment for mortgagee.

6. Appeal and error ⇨110

An appeal does not lie from an order denying a motion for new trial in an action to foreclose a chattel mortgage wherein the mortgagors cross-complain for damages for alleged fraud on part of mortgagee. Code Civ.Proc. § 963, as amended by St.1933, p. 2472.

Action by the Bank of Perris against F. E. Sandor and another to foreclose a chattel mortgage, wherein, subsequent to the execution of a compromise, the defendants filed an answer and cross-complaint seeking recovery against the plaintiff because of the plaintiff's alleged fraud. From an adverse judgment the defendants appeal, attempting to appeal also from an order denying a new trial.

Attempted appeal from order denying a new trial dismissed, and judgment affirmed.

Clay & Handy, of Los Angeles, for appellants.

A. Heber Winder, of Riverside, for respondent.

MARKS, Justice.

This is an appeal from a judgment and from an order denying a new trial in an action to foreclose a chattel mortgage, with a cross-complaint for damages. The trial court denied relief to both parties.

Plaintiff is a banking corporation with its principal place of business in Perris, in Riverside county. Defendants were farmers who did their banking business with plaintiff.

On September 29, 1931, defendants were indebted to plaintiff in the sum of \$1,730. They executed their promissory note for that amount and secured it by a chattel mortgage. They were not able to pay the indebtedness when due and voluntarily delivered part of their chattels to plaintiff for sale. These were sold at prices approved by defendants and part of the money was credited on the indebtedness. Plaintiff gave the balance of this money to defendants as they were hard pressed financially and needed it. Some of the chattels were sold by defendants and the money retained by them without the knowledge or consent of plaintiff.

On March 30, 1934, there was an unpaid principal balance of \$672.78 on the note, together with interest from October 29, 1932. Plaintiff brought suit to foreclose the chattel mortgage.

On October 23, 1931, F. E. Sandor executed a bill of sale to plaintiff of personal property which contained among the articles sold some of the mortgaged property. Defendants received due credits for the selling price of these articles.

After the action was filed, and to compromise the matter, on April 5, 1934, F. E. Sandor executed another bill of sale to plaintiff and delivered the property to it.

Appeal from Superior Court, Riverside County; R. A. Moore, Judge.

As a part of the same transaction, two days later, defendants executed the following instrument:

"Release

"For and in consideration of the sum of One Dollar (\$1) this day to us paid and other valuable considerations, we hereby release the Bank of Perris, a corporation, from any and all claims which we or either of us may have against it, of every kind and description up to the date of this release. We also declare that we have unconditionally delivered possession to said bank of all the personal property secured by the chattel mortgage which was sought to be foreclosed in the complaint in the action by said bank against us, being number 25307 of the files of the Superior Court of the State of California, in and for the County of Riverside.

"We further certify that the delivery of the bill of sale by us to said bank to said property was unconditional and without any agreement whatsoever.

"It is understood that said consideration for the giving of said bill of sale to said bank is to release us from further liability on the note secured by said mortgage.

"Dated: April 7th, 1934.

"F. E. Sandor

"Anna T. Sandor

"Signed, sealed and delivered in the presence of

"Witness

"C. J. Cutler

"C. R. Stewart."

The property was sold and, in accordance with the agreement expressed in the quoted writing, the indebtedness was regarded as paid.

On July 12, 1935, fifteen months later, defendants filed an answer and cross-complaint whereby they sought judgment against plaintiff in the sum of \$5,493.12. Their cause of action, if one were stated, was based upon alleged fraud on the part of plaintiff. This alleged fraud consisted of two elements: (1) The inclusion in the chattel mortgage of a Diesel engine and a pump which defendants maintain were fixtures attached to and a part of the realty, and (2) representation by the officers of the plaintiff that under the chattel mortgage plaintiff could take possession of the mortgaged property and sell it without the consent of defendants, coupled with the allegations of ignorance of the law on the

part of defendants, and knowledge of the law on the part of the officers of plaintiff.

It should be here observed that the chattel mortgage contained the usual provision that in case of default the mortgagee might take possession of the mortgaged property and sell it according to law.

[1,2] We know of no reason why a mortgage may not be made on both real and personal property. Here, the rights of third persons are not involved and as between the parties to the mortgage a sufficient lien is created on the property described therein.

[3-5] The trial court, on ample evidence, found that the mortgaged property involved here had been voluntarily delivered by defendants to plaintiff and sold by plaintiff at prices approved by defendants, and all the money received, except that paid to or taken by defendants, had been credited on the debt.

The trial court, on ample evidence, further found that after the foreclosure suit was instituted the parties had effected a complete compromise and settlement. This was evidenced by the bill of sale we have referred to and the release we have quoted. A copy of this release was attached to the answer to the cross-complaint. Its genuineness and due execution was admitted by the failure to deny the same as required by section 448 of the Code of Civil Procedure, as amended by St.1933, p. 2548, § 2.

Defendants attack the findings. They are prolix and some of them are unnecessary. The trial court found untrue the allegations of purported fraud and further found that the compromise and final settlement had been freely and fairly made. There is evidence to support these findings. They are sufficient to support the judgment and the others may be disregarded as unnecessary. The appeal is so entirely without merit that a detailed discussion of the challenged findings could serve no good purpose.

[6] An appeal from an order denying a motion for new trial does not lie in a case of this nature. Section 963, Code Civ. Proc., as amended by St.1933, p. 2472.

The attempted appeal from the order denying the motion for new trial is dismissed. The judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

KOYER et ux. v. McCOMBER et al.*

Civ. 11248.

District Court of Appeal, Second District,
Division 1, California.

Jan. 17, 1938.

Rehearing Denied Feb. 8, 1938.

Hearing Granted by Supreme Court
March 17, 1938.

1. New trial ☞6

The matter of granting or refusing to grant new trial is largely within discretion of trial court.

2. New trial ☞72

Trial court, in passing upon motion for new trial, is not bound by rule of conflicting evidence as is appellate court, but must weigh and consider evidence for both parties and determine for itself the just conclusion to be drawn from the evidence, and, if trial court is satisfied that finding of jury is contrary to weight of evidence, court may grant new trial.

3. New trial ☞68

Trial court, in determining whether to grant new trial, may consider question of probative force or evidentiary value of testimony, even though evidence is not conflicting and all proof seems to be favorable to one or other of the parties litigant.

4. Appeal and error ☞977(3), 979(2)

It is beyond power of reviewing court to interfere with ruling of trial court granting new trial unless a manifest abuse of discretion appears, or there is no substantial conflict in testimony on material issues and evidence is insufficient as matter of law to support verdict in favor of moving party.

5. New trial ☞70

In action against apartment owners for fraud in connection with exchange of apartment for vacant lots, granting new trial to apartment owners for insufficiency of evidence was abuse of discretion, where uncontradicted evidence showed apartment owners, through agents, falsely represented nature of structure of apartment, and falsely represented income and expense items in connection with operation of apartment, notwithstanding inspection of plans and specifications for apartment would have shown nature of its construction.

6. Fraud ☞23

Generally, one has right to rely on statement of material facts essentially connected with substance of a transaction, when party making statement is aware that reliance

is being placed upon his representations and that facts cannot be expected to be within other party's knowledge.

7. Fraud ☞18

One material false statement made by party to a transaction is sufficient ground for legal action by other party to the transaction.

8. New trial ☞70

In action for fraud in connection with exchange of vacant lots for apartment, granting new trial for insufficiency of evidence, to real estate brokers who relayed false information given by apartment owners was not abuse of discretion.

9. Fraud ☞38

A right of action for fraud arises immediately upon consummation of the fraud which may arise in a contract executed or executory.

10. Fraud ☞31

An action for fraud in connection with a contract is not an action upon the contract, but is collateral to contract, and is an action on the case.

11. Fraud ☞34

One induced by fraud to enter into a contract for exchange of realty is not required to perform on his part as a condition to maintaining an action for fraud.

12. Fraud ☞31

One who brings an action for fraud in connection with contract for exchange of realty does not affirm the contract as one made in good faith, and, although he consents to be bound by provisions of contract, he does not release his claim for damages arising from fraud collateral to the agreement.

13. Fraud ☞34, 50

One who sues for fraud in connection with a land exchange contract must himself be willing and able to perform on his part, and it is conclusively presumed that he stands ready and willing to pay the full consideration called for by the contract, when he shall become liable therefor.

14. Fraud ☞62

Where owner of realty, who sues for fraud in connection with land exchange contract, has not paid entire amount due by him under the contract, owner may recover same damages as he could have if contract were fully performed by him, and from any

damages he recovers must be deducted any unpaid part of the purchase price of the land.

15. Appeal and error ⚡930(2)

In action for fraud in connection with exchange of realty, reviewing court, in determining whether trial court properly granted new trial, could not assume that jury disregarded proper instruction that any amount plaintiffs owed on the contract of exchange should be deducted from damages awarded for fraud.

16. Fraud ⚡62

One induced by fraud to enter into a contract for purchase of realty may withhold payments due under the contract, after discovery of fraud, pending action for damages.

17. New trial ⚡76(1)

A verdict will not be disturbed as excessive unless the damages awarded are so excessive as to indicate that jury acted under influence of passion or prejudice. Code Civ.Proc. § 657.

18. New trial ⚡76(2)

\$47,500 for fraud in connection with land exchange contract was not excessive to extent of requiring new trial, where evidence concerning damages was in conflict and nothing in record indicated jury was actuated by passion or prejudice. Code Civ. Proc. § 657.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action for damages for fraud in connection with an exchange of property by A. S. Koyer and wife against C. L. McComber and others, wherein defendants C. L. McComber and wife filed a cross-complaint. Judgment was for the plaintiffs, and, from an order granting motion for new trial, the plaintiffs appeal.

Order reversed as to defendants C. L. McComber and wife and affirmed as to defendants T. C. Holz and C. J. Jasper.

Laurence B. Martin, of Los Angeles, for appellants.

W. I. Gilbert and W. I. Gilbert, Jr., both of Los Angeles (Jean Wunderlich, of Los Angeles, of counsel), for respondents C. L. McComber and Linnie H. McComber.

Edwin C. Boehler, of Los Angeles, for respondents T. C. Holz and C. J. Jasper.

WHITE, Justice.

Plaintiffs commenced an action for damages, alleging fraud in connection with an exchange of properties owned respectively by plaintiffs and defendants C. L. McComber and his wife, Linnie H. McComber. These last-named defendants answered and set up three separate cross-complaints. The defendants Holz, Jasper, and Leninger also filed answers, while the defendant Mitchell failed to answer and his default was duly entered. The trial was had before a jury, resulting in a verdict for plaintiffs in the sum of \$47,500, together with a verdict against defendants McComber on their cross-complaints. Judgment being entered on the verdict, defendants McComber, Holz, and Jasper moved for a new trial. From an order granting such motion, this appeal is prosecuted by plaintiffs.

Epitomized, the facts of the case are that plaintiffs were the owners of certain unimproved real property in the city of Los Angeles, while defendants McComber owned certain improved real property in the city of Long Beach, known as the Terry Apartments. In the early part of March, 1932, the defendant L. B. Mitchell, who was the brother of plaintiff Martha M. Koyer, went to the office of defendant C. T. Holz, a real estate broker in Long Beach, stating that his sister and brother-in-law, the plaintiffs herein, wished to exchange certain real property of theirs for income-producing property. The defendant Holz informed Mitchell that he believed the plaintiffs might be interested in the Terry Apartments; that, while he did not have a listing on the property, he knew the defendant Jasper did have such a listing; and that a deal might be made whereby the Terry Apartments could be exchanged for plaintiffs' vacant property. Within a few days thereafter, defendant Jasper reported to defendant Holz that he had seen defendant McComber and that the latter was receptive to any proposition which might be submitted to him respecting an exchange of real properties. Shortly thereafter the plaintiffs, Mr. and Mrs. Koyer, went to Long Beach to the office of defendant Holz, and through defendant Jasper plaintiffs were permitted to go through the Terry Apartments. This first inspection of the apartments by plaintiffs took place in March, 1932. On March 9, 1932, the defendant Holz forwarded a letter to plaintiff A. S. Koyer in which he set forth the dimensions of the lot, a description of the building, which was char-

acterized as being of reinforced concrete, and which communication further declared that the income from the building during 1930 was \$34,000, while the expenses, including taxes, approximated \$1,000 per month, and that during 1931 the Terry Apartments produced an income of between \$29,000 and \$30,000, with expenses about the same as during the preceding year. The letter also called attention to an incumbrance on the Terry Apartments in the form of a loan in the sum of \$100,000 due the New York Life Insurance Company, running for 10 years, with interest at 6 per cent., payable \$2,500 semi-annually, and that the loan had been reduced to \$92,500.

On April 16, 1932, plaintiff A. S. Koyer submitted to defendants Holz and Jasper a written proposal of the properties which plaintiffs would exchange with defendants McComber for the Terry Apartments. Following receipt of this letter, defendants McComber, Holz, and Jasper came to the city of Los Angeles and inspected the properties which plaintiffs Koyer proposed to exchange for the Terry Apartments; and on this date defendant McComber made his final arrangements with defendants Jasper and Holz for the payment of the commission due them in the event an exchange with the plaintiffs was completed. Following further negotiations, all of the parties met at the Terry Apartments on May 18, 1932, upon which occasion an agreement of exchange was entered into. Following completion of an escrow, the plaintiffs went into possession of the Terry Apartments about the middle of June, 1932. A short time thereafter, according to the plaintiffs, while they were arranging for alterations in the basement of the building, they discovered that certain of the structural beams, represented to them to be of reinforced concrete, were made of wood; and thereafter further investigation revealed that the property, instead of being a class A reinforced concrete building, was not only not a reinforced concrete building, but was a class C building, within the meaning of the ordinances of the city of Long Beach. Plaintiffs also contended that within a short time after this discovery Mr. Koyer had an audit made of the books, discovering that the property, instead of making a profit, as set out, was making little, if any, money when the taxes on the property, the interest on the mortgage, and the costs of the insurance were taken into consideration. The record indicates that the books in the apart-

ment house contained only the running expenses of the building, and that the operating profit was paid to defendant McComber, who in turn kept private books at his ranch in Buena Park of the amount of taxes, insurance, and interest costs. It might here be noted that during the negotiations it developed that plaintiffs were unable to deliver a clear title to one of the pieces of property which they were exchanging with defendant McComber, and it was thereupon agreed between the parties that plaintiffs would, as they did, execute a promissory note in the sum of \$10,000, payable to defendants McComber, secured by a second deed of trust on the Terry Apartments. None of the principal on this note has been paid, and but a small amount of interest payments were met.

Plaintiffs base their claim for damages upon the alleged misrepresentations with reference to the construction of the Terry Apartments and the income and expenses in connection with the operation thereof, which representations defendant Holz testified he obtained from a prospectus prepared by defendant Jasper and a Mr. De Land, the latter a son-in-law of defendant McComber, whom the latter had placed in charge of the Terry Apartments, and to whom defendant McComber had referred defendant Jasper to obtain information regarding the property in connection with the exchange thereof. That both defendants Holz and Jasper, as well as De Land, were the agents of defendants McComber there can be no question.

[1-4] It is apparent from the foregoing that, if the appeal herein were one taken from the judgment entered on the verdict in favor of the plaintiffs and against defendants McComber, it would be held that the evidence narrated would be legally sufficient to sustain such judgment. But that is not the situation. We are here dealing with an appeal from an order of the trial judge granting a new trial, and therefore on such an appeal, in reviewing the evidence, we are governed by an entirely different rule. As said in *Moss v. Stubbs*, 111 Cal.App. 359, 295 P. 572, 296 P. 86, the well-settled rule is that the matter of granting or refusing to grant a new trial is largely within the discretion of the trial court (*Work v. Whittington*, 61 Cal.App. 302, 214 P. 474); that in passing upon such motion the trial court is not bound by the rule of conflicting evidence as is the appellate tribunal (*Huckaby v. Northam*, 68 Cal.

App. 83, 228 P. 717; *Smith v. Royer*, 181 Cal. 165, 183 P. 660); but must weigh and consider evidence for both parties and determine for itself the just conclusion to be drawn from it (*Green v. Soule*, 145 Cal. 96, 78 P. 337; *Rudin v. Luman*, 53 Cal. App. 212, 199 P. 874); and, if it is satisfied that the finding of the jury is contrary to the weight of the evidence, it may grant a new trial (*Gordon v. Roberts*, 162 Cal. 506, 123 P. 288). As a matter of fact, even where the evidence is not conflicting, and all the proof seems to be favorable to one or the other of the parties litigant, the question of the probative force or the evidentiary value of the testimony is, nevertheless, within the determination of the trial court in a proceeding on motion for a new trial. *Otten v. Spreckels*, 24 Cal.App. 251, 141 P. 224; *Roberts v. Southern Pac. Co.*, 54 Cal.App. 315, 201 P. 958. Therefore, under the law as thus declared, it is beyond the power of the reviewing court to interfere with the determination of the trial court unless a manifest abuse of discretion appears (*Campanella v. Campanella*, 204 Cal. 515, 269 P. 433; *Buck v. Borchers*, 203 Cal. 210, 263 P. 226), or there is no substantial conflict in the testimony on material issues and the evidence as a whole is insufficient as a matter of law to support a verdict in favor of the moving party. (*Springer v. Pacific Fruit Exchange*, 92 Cal.App. 732, 268 P. 951; *Wendling Lumber Co. v. Glenwood Lumber Co.*, 153 Cal. 411, 95 P. 1029; *Empire Inv. Co. v. Mort*, 169 Cal. 732, 147 P. 960; *Harvey v. Machtig*, 73 Cal.App. 667, 239 P. 78).

[5] It is upon the principle just stated that we conclude that the trial court was in error in granting a new trial as to defendants McComber upon the first ground set forth in the motion, viz., insufficiency of the evidence to justify the verdict. We arrive at this conclusion because a reading of the transcript shows that there is no conflict whatever in the testimony with reference to the fact that defendants McComber, through their duly appointed and designated agents, falsely represented to plaintiffs that the Terry Apartments was a reinforced concrete building, and also misrepresented the income and expense items in connection with the operation of the property. In fact, defendant C. L. McComber himself testified that at all times he knew personally that the structure was not a reinforced concrete building, and there is no conflict

whatever in the evidence to the effect that two sets of books were kept in connection with the Terry Apartments, one set by the manager, De Land, in which were recorded so-called operating expenses, while another set of books was kept by the owner, defendant McComber, at his ranch, in which were recorded other items of expense, which, when deducted from the gross income for 1930 and 1931, showed a very meager profit, far less than was represented to plaintiffs. These constituted material representations, and, there being no conflict in the testimony that the plaintiffs relied thereon to their damage, the same constituted material issues at the trial, and the evidence thereon, as a whole, is insufficient as a matter of law to support a verdict in favor of the moving party as far as defendants McComber are concerned. Such being the case, the motion for a new trial on the ground of insufficiency of the evidence to justify the verdict should have been denied as to the last-mentioned defendants.

[6,7] We are not unmindful of respondents' claim that reference to the plans and specifications for the Terry Apartments would have disclosed to plaintiffs the class and construction of the building, and also that plaintiffs undertook to examine such plans and specifications, but desisted when the same were not available at the time one of the plaintiffs went to inspect the same. However, the general rule is that one has a right to rely on statement of material facts essentially connected with the substance of the transaction, when the party making the statements is aware that reliance is being placed on his representations and that the facts are not and cannot be expected to be within the first party's knowledge. 12 Cal.Jur. 754, and cases cited. As to the representations made concerning the income and expense accounts, plaintiffs had no knowledge thereof, nor means of obtaining such information except from the defendants, and, if one material statement be false, and there is no conflict in the record here either as to the materiality or the falsity of the last-named representation, it is sufficient ground for legal action.

[8] As to the defendants Holz and Jasper, a different situation presents itself. The false representations made with reference to the construction of the building and items of income and expense which

were given to plaintiffs were relayed to them by respondent Jasper, who received them from the respondent McComber, through the latter's agent and manager of the Terry Apartments. The trial court had a right to conclude that the conduct of the respondent Jasper was without taint of fraud; that he had a right to believe that the information so given him was true and to accept respondent Jasper's testimony that he did so believe. As to the defendant Holz, we are in accord with the holding of the trial court, summarized in its order granting a new trial, that the evidence was insufficient to justify any judgment against Holz.

[9-16] Other grounds upon which the order granting a new trial was based were "that damages are excessive in view of the refusal to pay the \$10,000 note"; and "that the judgment is against the law and evidence, plaintiff having affirmed the exchange and refused to comply in toto with his contracts." The trial court apparently was of the opinion that the plaintiffs could not maintain this action for damages unless it was alleged and shown that they were ready and willing to comply with the provisions of the contract, but it is a principle of universal application that a right of action for damages for fraud arises immediately upon the consummation of the fraud, which may arise in a contract executed or executory. *Paolini v. Sulprizio*, 201 Cal. 683, 258 P. 380. The action is not upon the contract, but is collateral to it, and is on the case; and one induced by fraud to enter into a contract for the exchange of real estate is not required to perform on his part as a condition to maintaining an action for deceit. Indeed, in many cases it would be unjust to hold that the party defrauded shall lose the advantage which attaches to a tort action unless he makes further venture in a transaction into which he has been induced by fraud to enter. While it is true he affirms the contract, he does not do so as one made in good faith. He consents to be bound by the provisions of the agreement, but does not thereby release or waive his claim for damages arising from a fraud collateral to the agreement. He must himself be willing and able to perform on his part, and it must be conclusively taken that he stands ready and willing to pay the full consideration called for by the contract, if and when he shall become liable therefor. If the contract remains executory, the damages which he

is entitled to recover are no other and no greater than those which would be awarded to a party who has fully executed his contract. From any award which may be made because of the fraud must be deducted any unpaid part of the purchase price. *Palladine v. Imperial Valley, etc., Ass'n*, 65 Cal.App. 727, 225 P. 291. And in the instant case the jury was properly instructed by the trial court that from the damages which they found the plaintiffs were entitled to recover they must deduct any sum which they might find that the plaintiffs owed the defendants under the contract for the exchange of properties. This instruction of necessity referred to and included the obligation of the plaintiffs to pay the defendants \$10,000 upon their promissory note. It cannot be assumed that the jury erroneously disregarded this instruction and failed to deduct this sum which the plaintiffs owed the defendants under the contract in determining the final amount of their verdict. One induced by fraud to enter into a contract for the purchase of real estate may withhold payments after the discovery of the fraud and pending the action for damages. True, the plaintiff in such an action must be willing and able to pay if and when he shall become liable therefor; but the fraud suspends liability to make payments accruing after discovery of the fraud and pending the action. Payments may be withheld to recoup such damages as may be recovered. *Pembroke v. Houston*, 41 Cal.App. 54, 55, 181 P. 828.

[17, 18] As to excessive damages, a new trial may not be granted merely because the verdict seems large, or because it is larger than the court, if sitting as a jury, would have given; but only where it appears that it was "given under the influence of passion or prejudice." Section 657, Code Civ.Proc. In other words, the "verdict will not be disturbed as excessive unless the damages awarded are so excessive as to indicate that the jury acted under such influences." 20 Cal.Jur. 101. While the evidence was in conflict concerning the amount of the damages suffered by plaintiffs, there is nothing in the record indicating that the jury here was actuated by elements of passion or prejudice in believing and acting upon testimony which, if believed, justified a finding in favor of plaintiffs for the amount of damages awarded by the verdict.

It would unduly prolong this opinion to consider separately the instructions to

which exceptions are taken by respondents. Suffice it to say, we have read the instructions given, and conclude that, taken as a whole, they form a full, fair, and correct presentation of the law applicable to the issues framed in this action and the evidence introduced at the trial. No errors of law are shown to have occurred during the conduct of the trial, which would justify setting aside the verdict and judgment predicated thereon.

Respondents' claim that the appeal herein should be dismissed for failure to comply with section 953a et seq. of the Code of Civil Procedure, as amended and section 3, rule VIII, of the Rules of the Supreme Court and District Court of Appeal, is without merit, because there has been a sufficient compliance with the Code sections and rules aforesaid to entitle appellants to a determination of their appeal upon its merits.

Other points raised do not require discussion.

For the foregoing reasons, the order appealed from by which a new trial was granted is reversed as to respondents C. L. McComber and Linnie H. McComber; and, as to defendants T. C. Holz and C. J. Jasper, the order is affirmed.

We concur: YORK, P. J.; DORAN, J.



24 Cal.App.2d 395

TOOMES et ux. v. NUNES et al.

Civ. 5834.

District Court of Appeal, Third District,
California.

Jan. 15, 1938.

1. Trial ⇨94

Motion to strike question and answer in automobile accident case showing plaintiff's automobile to be insured, on ground that question and answer were improper, and without assigning as error fact that question and answer disclosed plaintiffs were insured, was properly overruled, since defendants were entitled to have specific grounds of objection to evidence stated on motion to strike.

2. Trial ⇨82

Party offering evidence is entitled to have particular portion of evidence objected to pointed out and specific grounds of objection stated in order that he may obviate the objection or waive the testimony.

3. Trial ⇨93

The rule requiring specific objection to proffered evidence to be pointed out applies with equal respect to motion to strike evidence from record.

4. Trial ⇨127

Evidence, which is competent because addressed to valid issue, is admissible although it may incidentally disclose an insurance company is interested in litigation.

5. Trial ⇨96

A motion to strike evidence is addressed to its competency and not weight, and if it is competent for any purpose it should not be stricken, but its application may be limited by proper instructions to jury.

6. Appeal and error ⇨928(1)

In automobile accident case where evidence disclosed that plaintiff was insured and instructions given were not included in transcript on appeal and it was not claimed that verdict was excessive, Court of Appeals would assume that jury was charged that it must not render a verdict based on prejudice against an insurer, nor consider fact that plaintiffs carried indemnity insurance as reason for rendering judgment against them.

7. New trial ⇨143(5)

In automobile accident case, where plaintiff made voluntary statement that he was insured, jurors could not impeach their verdict by affidavits that they considered evidence that plaintiff was insured in arriving at their award of damages.

8. Appeal and error ⇨528(4)

Affidavit of jurors filed on motion for new trial but not included in transcript on appeal could not be considered by Court of Appeals.

9. New trial ⇨143(5)

In automobile accident case, motion for new trial supported by affidavits of ten jurors showing that jurors considered voluntary statement of plaintiff that he was insured was properly denied.

10. New trial ⇐143(1)

The affidavits of jurors may not be received to contradict, impeach, or defeat their verdict, except when jurors resort to chance to determine their verdict.

Appeal from Superior Court, Stanislaus County; L. J. Maddux, Judge.

Action for damages for personal injuries sustained in automobile accident by C. R. Toomes and wife against A. J. Nunes and another, wherein defendants filed cross-complaint. Judgment against the plaintiffs on their complaint, and awarding damages to defendants in the sum of \$2,500 on their cross-complaint, and plaintiffs appeal.

Affirmed.

Thomas F. Griffin and Edward T. Taylor, both of Modesto, for appellants.

J. Hampton Hoge, of San Francisco, and A. A. Cardozo, of Modesto (A. Dal Thomson, of San Francisco, of counsel), for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

Plaintiffs brought this suit for damages for personal injuries received in an automobile casualty as the alleged result of negligence on the part of the defendants. The defendants denied the material allegations of the complaint, and filed a cross-complaint, charging plaintiffs with damages for injuries which they also sustained in the same accident. The jury returned a verdict against the plaintiffs upon their complaint, and awarded damages to defendants on their cross-complaint in the sum of \$2,500 and costs of suit. Judgment was rendered accordingly. From that judgment plaintiffs have appealed.

The only grounds urged for reversal of the judgment are that the court erred in permitting evidence to remain in the record that plaintiffs were insured against loss sustained as a result of the automobile accident, and that the jurors were guilty of prejudicial misconduct in considering that evidence of indemnity insurance in arriving at their verdict as shown by their affidavits presented upon motion for a new trial.

It appears that plaintiffs alleged in their complaint special damages to their automobile in the sum of \$190. Mr. Toomes testified that the market value of their machine before the accident was \$225, and that

it was of no value after the collision occurred. On cross-examination the attention of the witness was called to the fact that he had alleged in his complaint that the damage to his automobile was only the sum of \$190. He was then asked: "Now how do you arrive at the figure of \$190.00?" To this question he replied: "Because I—On my application the company allowed me \$190.00 and salvage.

"Q. That is your insurance carrier, is that correct? A. Yes, my insurance carrier."

[1] To the last-mentioned question and answer the plaintiffs' attorney failed to object. He did, however, move to strike out the question and answer on the sole ground that they were "improper." There was no suggestion as to the reason they were considered improper. There was no assignment of error on the ground that the question and answer disclosed the fact that the plaintiffs were insured. The motion to strike the evidence from the record was therefore ineffectual. The defendants were entitled to have the specific ground of the objection to the evidence stated on the motion to strike it from the record.

[2] It is said in 2 California Jurisprudence, page 264, § 82: "The party offering evidence is entitled to have the particular portion of the evidence objected to pointed out, and the specific ground of the objection stated, in order that he may obviate the objection or waive the testimony."

[3] The rule requiring the specific objection to proffered evidence to be pointed out also applies to a motion to strike evidence from the record. In 6 Jones Commentaries on Evidence (2d Ed.) page 5000, § 2527, it is said: "Like an objection [to evidence], a motion to strike out testimony should specify grounds and reasons, as well as the portion of the evidence objected to."

In the present case the appellants had ample opportunity to object to the challenged question before it was answered. They failed to do so. That question was propounded to the witness after he voluntarily said the valuation of his machine as it was stated in the complaint was fixed by "the company." He said: "On my application the company allowed me \$190.00 and salvage." The defendants were entitled to know the identity of that company which fixed the value of plaintiffs' automobile so as to determine the reliability of the appraiser

and the weight to be given to the evidence. An uncertainty existed as to whether the witness referred to the company from which he purchased the machine, the company which financed his purchase, or some other company. It does not seem improper that the voluntary statement of the witness that the valuation of the machine was fixed at \$190 "by the company" should be followed by the inquiry: "That is your insurance carrier, is that correct?" At least we are unable to say the question was asked in bad faith.

[4,5] It has been frequently held that when evidence is competent for any valid purpose under the issues of the case it may not furnish grounds for reversal of the judgment merely because it incidentally discloses the fact that an insurance company is interested in the outcome of the cause. *Fleming v. Flick*, 140 Cal.App. 14, 32, 35 P.2d 210; *Dermer v. Pistoresi*, 109 Cal.App. 310, 315, 293 P. 78; 4 *Blashfield's Enc. of Auto. Law*, p. 1521, § 19. A motion to strike out evidence is addressed to its competency and not to its weight. If it is competent for any purpose it should not be stricken from the record, but its application may be limited by proper instructions to the jury. In 6 *Jones Commentaries on Evidence*, *supra*, at page 5002, it is said: "Where evidence has been properly received, * * * the party against whom it has been received has no absolute right to have it stricken out, but should request the court to charge the jury to disregard such evidence," or to limit its application.

[6] We must assume the jury was so properly instructed with respect to the challenged evidence, since the instructions which were given to the jury are not included in the transcript on appeal. The instructions are not before this court. Very likely the jury was charged that it must not render a verdict based on prejudice against an insurance company, or consider the fact that the plaintiffs carried indemnity insurance as a reason for rendering judgment against them. Certainly the jury was instructed they could award damages against the plaintiffs only for such sum as would compensate the defendants for the injuries sustained as a result of plaintiffs' negligence. It is not contended the verdict is excessive. Under the circumstances of this case, we may not assume the plaintiffs were prejudiced by the question and answer complained of. It must be true that all jurors know most owners of automobiles carry indemnity insur-

ance these times when motor vehicle accidents are so common.

[7-9] The jurors in this case may not impeach their verdict by means of affidavits that they considered the evidence that plaintiffs were insured, in arriving at their award of damages. The appellants assert in their opening brief that the affidavits of ten of the jurors to that effect were filed on the motion for a new trial. Those affidavits are not included in the transcript on appeal. We have no means of ascertaining the contents of those affidavits. They may not therefore be considered by this court. It was not proper for the trial court to consider them on the motion for new trial. We assume that court disregarded them. The motion for a new trial was properly denied.

[10] It is established law in this and other jurisdictions that the affidavits of jurors may not be received to contradict, impeach, or defeat their verdict, except when the jurors resort to chance to determine their verdict. 24 Cal.Jur. 877, § 126; 97 A. L.R. 1038, note; *Saltzman v. Sunset Tel. & Tel. Co.*, 125 Cal. 501, 58 P. 169.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



24 Cal.App.2d 359

JACOBS v. BOARD OF DENTAL EXAMINERS, and three other cases.

Civ. 10287, 10288, 9836, 9837.

District Court of Appeal, First District,
Division 1, California.

Jan. 13, 1938.

Hearing Denied by Supreme Court
March 14, 1938.

1. Constitutional law ☞80(2)

In absence of constitutional provision, the Legislature has no authority to confer any judicial functions upon an administrative board.

2. Physicians and surgeons ☞5(3)

Prohibition ☞6(2)

The superior court was without jurisdiction of proceedings in prohibition and certiorari to review action of Board of Dental Examiners in revoking practitioners' licenses, since board had exercised discretionary

"administrative functions" and not "judicial powers," and neither prohibition nor certiorari will lie to review the exercise of administrative functions of that board.

[Ed. Note.—For other definitions of "Judicial Power," see Words & Phrases.]

3. Certiorari ☞35

Prohibition ☞16

The constitutional jurisdiction of the superior court to issue writs of prohibition and certiorari cannot be conferred by the parties.

4. Appeal and error ☞183

Certiorari ☞70(2)

The failure to object in superior court to appropriateness of writs of certiorari and prohibition to review action of Board of Dental Examiners in revoking practitioners' licenses was not a waiver of right to object on appeal, since, if that were the case, jurisdiction could be conferred by the parties, and that cannot be done.

5. Appeal and error ☞171(2)

Certiorari ☞70(2)

Where practitioners inappropriately sought review of action of Board of Dental Examiners in revoking their licenses by writs of prohibition and certiorari, writs could not be treated as writs of mandate on appeal from judgments partly denying and partly granting relief sought, since a case on appeal must be disposed of on issues presented in court below.

6. Appeal and error ☞1116

Certiorari ☞70(9)

Where practitioners inappropriately sought to review action of Board of Dental Examiners in revoking their licenses by writs of prohibition and certiorari, the reviewing court, on appeal from judgments partly denying and partly granting relief sought, had no power to give appropriate equitable relief warranted by record.

Appeals from Superior Court, City and County of San Francisco; Louis H. Ward and Franklin A. Griffin, Judges.

Proceedings in prohibition and certiorari by Malcolm M. Jacobs and by Wilbur L. Parker against the Board of Dental Examiners, and by Wilbur L. Parker and Malcolm M. Jacobs against the Board of Dental Examiners and others to review the action of the Board of Dental Examiners in revoking the petitioners' licenses. From

the judgments in the first and second proceedings, the Board appeals, and from the judgments in the third and fourth proceedings, all parties appeal.

Proceedings remanded with directions.

H. E. Lindersmith, of Los Angeles, for appellants.

Walter H. Linforth and William M. Cannon, both of San Francisco, for respondents.

TYLER, Presiding Justice.

[1-6] Proceedings in prohibition and certiorari were instituted in the court below for the purpose of reviewing the action of the Board of Dental Examiners in revoking the licenses of certain practitioners, parties hereto. Hearings were had thereon and certain judgments were entered which are here sought to be reviewed on appeal. Since the filing of the briefs the cases of Whitten v. California State Board of Optometry, Cal.Sup., 65 P.2d 1296, and Hartman v. Board of Chiropractic Examiners, Cal.App., 66 P.2d 705, have been rendered by our appellate courts. See, also, Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 59 P.2d 119; MacCracken v. Board of Medical Examiners, Cal.App., 74 P.2d 289. These decisions are to the effect that neither prohibition nor certiorari will lie to review the exercise of the purely administrative functions of such boards, and in the absence of constitutional provision the Legislature is without authority to confer upon an administrative board any judicial functions. Here the board in question exercised discretionary administrative functions in revoking the licenses and did not exercise judicial powers. This being so, the superior court was without jurisdiction to consider or determine the issues there presented. It is argued that notwithstanding this fact the cases should be heard on their merits because: (1) The right to object to the appropriateness of the remedies invoked was not raised in the superior court; (2) because the writs of prohibition and certiorari may be treated as writs of mandate; and (3) if mandate is not the proper remedy, then the court with all the facts before it will give such appropriate equitable relief as the record warrants. The problem with which we are confronted goes to the constitutional jurisdiction of the court to issue the writs. Such jurisdiction cannot be conferred. Failure to object to the proceedings in

the court below therefore cannot constitute a waiver. Such a rule would result in the conferring of jurisdiction by the parties, which, of course, cannot be done. *Standard Oil Co. v. State Board of Equalization*, supra; *Schwab-Wilson Machine Corp. v. Daugherty*, 15 Cal.App.2d 701, 59 P.2d 1057. See, also, *Hartman v. Board of Chiropractic Examiners*, supra; *O'Donnell v. Board of Medical Examiners*, Cal.App., 70 P.2d 246. Nor can the writs in question be considered writs of mandate. In the cases at bar the accused dentists sought and obtained orders granting them the very relief they sought. Pursuant to such petitions, after hearing the court entered its judgment denying and granting parts of the relief sought. The orders which they sought and obtained cannot be attacked in this manner. A case on appeal must be disposed of upon the issues presented in the court below. Nor have we any power to grant equitable relief.

From what we have said it follows that the proceedings should be remanded to the court below, with directions to dismiss the writs of prohibition and review issued herein, together with the petitions therefor. *Schwab-Wilson Machine Corp. v. Daugherty*, 15 Cal.App.2d 701, 59 P.2d 1057. It is so ordered.

We concur: KNIGHT, J.; CASHIN, J.



24 Cal.App.2d 429

DUCEY v. DAMBACHER, County Auditor.*

Civ. 5884.

District Court of Appeal, Third District,
California.

Jan. 18, 1938.

1. Taxation ⚡529

The sale by operation of law which takes place when taxes have not been paid by a certain date is not a "sale provided by law for the payment of the tax" within statute creating a presumption of payment of taxes 30 years from time tax becomes a lien, unless property subject thereto has been sold in manner provided by law for payment of the tax. Pol.Code, § 3716, as amended by St.1931, p. 144, § 3771.

2. Constitutional law ⚡16

The argument presented to voters prior to a general election explaining proposed constitutional amendment, the purpose of which was to ratify statute of limitations on taxes, could be considered in determining purpose and intent of the proposition submitted and construing its meaning. Pol. Code, § 3716, as amended by St.1931, p. 144; Const. art. 4, § 31b.

3. Taxation ⚡515, 835

The imposition of penalties for nonpayment of a tax is a legislative function, and, although the lien of tax may be removed, the obligation still remains.

4. Taxation ⚡529

The purpose of the statute providing that every tax shall be conclusively presumed to have been paid after 30 years from time tax became a lien, unless property subject to tax has been sold in manner provided for payment of the tax, is to prevent taxpayers from being harassed by claims of unpaid taxes dating back more than 30 years. Pol.Code § 3716, as amended by St. 1931, p. 144.

5. Constitutional law ⚡205(1)

States ⚡119

Taxation ⚡37, 529

The statute providing that it shall be conclusively presumed that every tax has been paid after 30 years from time tax became a lien unless the property subject thereto has been sold in manner provided by law for payment of the tax does not cancel a tax, and hence is not unconstitutional as granting special immunities and lending credit by the state. Pol.Code, § 3716, as amended by St.1931, p. 144.

6. Taxation ⚡614

The purpose of any sale of property on the delinquent tax list is to restore property to channels of trade and eventually to obtain revenue for support of government, and not that the state might acquire the property.

7. Taxation ⚡529

A "sale in the manner provided by law," within statute providing that every tax shall be conclusively presumed to have been paid after 30 years from time tax became a lien, unless property subject thereto has been sold in manner provided by law for payment of tax, requires the levying of a valid tax, entry of delinquency if tax is not paid, and an indorsement by the auditor, "Sold to

*For subsequent opinion see 81 P.2d 597.

the State," and if there is no redemption within five years, the sale at public auction for purpose of paying delinquent taxes, costs, and penalties. Pol.Code, § 3716, as amended by St.1931, p. 144; § 3771.

The question here involved is determined by a solution of section 3716 of the Political Code as amended in 1931, St.1931, p. 144, reading in part as follows:

"The judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof; provided, that effective one year from the time this act takes effect, the lien of every tax * * * shall cease to exist for all purposes after thirty years from the time said tax became a lien;

"Limitation. And provided further that effective one year from the time this act takes effect, every tax * * * shall be conclusively presumed to have been paid after thirty years from the time the same became a lien, unless the property subject thereto has been sold in the manner provided by law for the payment of said tax."

Section 3771 of the Political Code provided that if, upon a specified day and hour, the taxes, penalties, and costs assessed against the particular property had not been fully paid, then by operation of law and the declaration of the tax collector, the same shall be sold to the state and the tax collector shall make an entry opposite each parcel, "Sold to the State."

Appellant contends that where the assessment roll bears the stamp "Sold to the State," this transaction by operation of law constitutes the sale referred to in section 3716 of the Political Code. The trial judge held that in order that there be such a sale the state must completely dispose of the property by public auction. With this interpretation we are in accord.

[1] The sale by operation of law to the state as provided for in section 3771 is, in our opinion, not the sale contemplated in section 3716 of the Political Code. The sale to the state, section 3771, Pol. Code, is not a sale provided by law for the payment of the tax but is merely a book transaction to facilitate the adjustment of accounts between the tax collector and the auditor.

That the sale to the state was not intended to be treated as such sale as referred to in section 3716 of the Political Code is apparent from the argument sent to the voters of California prior to the general election of 1932, explaining a proposed constitutional amendment, now embodied in the Constitution, and known as section 31b of article 4, the purpose of which was to ratify a statute of limitations

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Proceeding by Adele Ducey for a writ of mandate to compel C. A. Dambacher, Auditor of the County of Tuolumne, State of California, to accept the tender of the plaintiff for certain delinquent taxes on realty and to issue a certificate of redemption clearing the realty of all delinquent taxes. From a judgment issuing the writ, the defendant appeals.

Affirmed.

C. H. Grayson, Dist. Atty., of Sonora, for appellant.

Rowan Hardin, of Sonora, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiff is the owner of a tract of land in the county of Tuolumne. The assessment rolls of that county show delinquent and unpaid taxes against this land for the year 1893, 1896, and 1897. Noted on the assessment rolls against this property is "Sold to the State." No proceedings have ever been taken to sell this property at public auction, and no deed has ever passed from the state to a purchaser. The property has been continuously assessed to the owner, and all taxes so assessed have been marked paid prior to 1931, except taxes for the years 1893, 1896, and 1897.

After 1931 the taxes became delinquent for the years 1931, 1932, 1933, 1934, and 1935. In 1935, plaintiff offered to pay the delinquencies for the years subsequent to 1931, but appellant, as auditor of the county of Tuolumne, refused to accept this tender for these delinquent taxes unless plaintiff would also pay the delinquencies for 1893, 1896, and 1897, together with all costs and penalties.

A writ of mandate was then sought to compel the auditor to accept the tender, and to issue a certificate of redemption clearing the property of all the delinquent taxes. After a hearing the trial court issued the writ, whereupon this appeal was taken.

on taxes. This argument reads in part as follows:

"The 1931 legislature passed a bill which would have the effect of placing a statute of limitation on taxes. Conflicting legal opinion made it desirable to pass Assembly Constitutional Amendment Number Two, which if approved by the electorate of the State will make constitutional the 1931 act, or permit the legislature to pass a constitutional act in 1933.

"During the early history of the state, when land was held in large parcels and taxes were small, the levying and collection of taxes was carried on in many counties in a careless and haphazard manner. Old tax rolls show taxes as unpaid which were in fact paid, receipts have been found among old private papers showing this to be the case.

"The law passed by the legislature in effect simply provides that when the State for thirty years has not exercised its right to sell the property for delinquent taxes, and when the time allowed by law for the State to sue to collect taxes has long since expired, the lien of the tax shall be removed also.

"In some counties private persons have made contracts with the authorities under which they dig up and examine the old tax rolls, and receive fifty per cent of all the old taxes which they may find, and which the present owners are compelled or induced to pay in order to clear their property. It is obviously unfair to permit the State to wait until all the parties are dead and all private records lost, and then endeavor to enforce a lien for taxes with all the penalties.

"The Constitutional Amendment in no way affects the collection of present taxes. It does not apply to cases in which the State has sold property for non-payment of taxes. It merely gives the legislature power, if it sees fit, to provide by law that if the State or its political subdivisions do not collect taxes or sell property for their non-payment within thirty years after the taxes are levied, the tax shall no longer be a lien upon the property."

[2] That such an argument may be considered in determining the purpose and intent of an act and construing its meaning is sanctioned in *Turlock Irrigation District v. White*, 186 Cal. 183, 198 P. 1060, 17 A.L.R. 72.

The statement to voters just referred to makes it clear that the limitation on

taxes applies only when the state has not sold the property for delinquent taxes. Here it is stipulated the state had not sold the property in question. After the amendment of section 3716 of the Political Code in 1931 the opinion of the Attorney General was sought as to the meaning of sections 3716 and 3771 of the Political Code. In part he said: "The words 'or the property sold for the payment thereof' and the words 'unless the property subject thereto has been sold in the manner provided by law for the payment of said tax' refer, in my opinion, not to the automatic 'Sale to the State' provided for in section 3771, but to a sale by the State pursuant to the provisions of section 3771a, providing for a sale at public auction after the five year period of redemption has elapsed."

This opinion of the Attorney General is supported by an analysis of certain cases, i. e., *Jacoby v. Wolff*, 198 Cal. 667, 247 P. 195; *Crocker v. Scott*, 149 Cal. 575, 87 P. 102; *Fox v. Wright*, 152 Cal. 59, 91 P. 1005, and *Merchants' Trust Co. v. Wright*, 161 Cal. 149, 118 P. 517.

[3-5] It might be urged that section 3716 of the Political Code was in effect a cancellation of a tax and therefore a violation of various constitutional provisions regarding the granting of special immunities, lending credit, etc. Again we adopt the reasoning of the Attorney General, who points out that the imposing of penalties for the nonpayment of a tax is a legislative function; it being merely a procedure or remedy for the enforcement of the principal obligation, and although the lien of the tax may be removed the obligation still remains. It is in effect merely a withdrawal of one method of enforcing payment of an obligation that still continues. Undoubtedly the purpose of the act was and is to prevent taxpayers from being harassed by claims of unpaid taxes dating back more than thirty years. The same argument that applies to any statute of limitations applies equally to a taxpayer, as pointed out in the argument submitted to the voters at the 1932 election.

Should the statute be held to apply to property "Sold to the State" by operation of law, the condition sought to be remedied would still exist and the taxpayer would obtain no relief. On the other hand, under the construction given by the trial court the section is effective and no one is injured, and the third person who may have purchased the property sold by the state

at auction is fully protected. The words in section 3716 of the Political Code, which made the act effective one year from the time the act took effect, was undoubtedly inserted so the state might have an opportunity to elect to exercise its right of sale on such thirty-year delinquencies before being precluded by the statute.

[6] Furthermore, the sale to the state is merely the first step in the making of a sale to the ultimate purchaser. It is not a completed transaction. The purpose of any sale of property on the delinquent list is to restore the property to the channels of trade and eventually to obtain revenue for the support of the government, and not that the state might acquire title to the property. The property is of no value to the state until returned to a tax-paying basis.

[7] In order that there may be a sale under the act referred to, three steps are necessary: First, the levying of a valid tax; second, the entry of the delinquency if the tax is not paid, and an indorsement by the auditor "Sold to the State"; and thirdly, if there is no redemption within five years, then the sale at public auction for the purpose of paying delinquent taxes, costs, and penalties. Each and all of these steps are necessary to constitute a sale "in the manner provided by law."

We are of the opinion, therefore, the judgment should be affirmed. It is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.



RUTHERFORD v. RIDEOUT BANK et al.*
Civ. 5482.

District Court of Appeal, Third District,
California.

Jan. 11, 1938.

Rehearing Denied Feb. 10, 1938.

Hearing Granted by Supreme Court
March 10, 1938.

1. Banks and banking ⇨112

Where bank cashier in whom mortgagor reposed confidence induced mortgagor to sell other property by threatening to foreclose bank's mortgage, pursuant to conspiracy

*For subsequent opinion see 80 P.2d 978.

with purchaser of other land and in furtherance of cashier's personal interest, bank and its successor were not liable to mortgagor for damages for fraud, in absence of showing that bank officers or directors knew of the fraud, as against contention that mortgagor and bank were in confidential relationship.

2. Banks and banking ⇨86

The term "banking business" generally means acceptance of money for deposit, discounting of notes and bills, and making and collection of loans, and does not include sale of property of bank's customers as a broker for commission.

[Ed. Note.—For other definitions of "Banking," see Words & Phrases.]

3. Banks and banking ⇨118

In action against bank for damages for fraud, allegedly committed by cashier who induced customer to sell property at inadequate price, customer had burden of establishing that bank had empowered its officers to negotiate sale on behalf of bank.

4. Banks and banking ⇨112

A bank does not become responsible, on ground of confidential relationship with its depositors or borrowers, for acts of bank's employees acting as counselors and advisors to depositors or borrowers.

5. Limitation of actions ⇨100(11)

Where bank cashier induced depositor to sell land to third party for inadequate price in 1920, allegedly by fraud, but such cashier ceased to be connected with bank in 1921, and nothing occurred to prevent depositor from discovering inadequacy of price or falsity of cashier's representations, depositor was guilty of inexcusable negligence in not suing bank for fraud until 1927, and action was barred by 3-year statute of limitation, notwithstanding that depositor did not discover until 1927 that cashier had accepted commission from purchaser of land for making false representations. Code Civ. Proc. § 338, subd. 4.

6. Fraud ⇨23

A confidential relationship does not of itself excuse defrauded person from exercising any diligence to discover fraud, especially where fraud consisted of persuading defrauded person to sell property below its fair price, but may be considered in determining whether defrauded person has exercised due diligence under circumstances.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action for damages for fraud by Mary A. Rutherford against the Rideout Bank and others. From a judgment for plaintiff, defendant the Bank of America National Trust & Savings Association appeals.

Reversed.

George F. Jones, of Oroville, Louis Ferrari and C. H. White, both of San Francisco, Rich, Weis & Carlin, of Marysville, and Keyes & Erskine, of San Francisco, for appellant.

Arthur B. Eddy and Elmer W. Armfield, both of Woodland, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an action against Robert J. Finney and the Bank of America, California Trust & Savings Association, as the successor of the Rideout Bank, to recover damages for fraud. After a trial by the court in which plaintiff recovered a judgment against the above defendants for \$12,880, this appeal is taken by the bank.

From the amended complaint it appears that on December 27, 1920, and for several years prior thereto, plaintiff was the owner of two parcels of real property; one known as the Rutherford ranch, and the other as the Home place. The Home place was subject to a mortgage of approximately \$9,000, held by the Rideout Bank, and the Rutherford ranch was subject to a deed of trust of \$30,000, which deed of trust was held by trustees for a beneficiary other than the bank.

The husband of plaintiff died on April 8, 1923, and for many years prior to his death he had been mentally incompetent. Plaintiff had no training in business and financial matters, and was entirely unfamiliar with such matters, and during her husband's incompetency she managed the two ranches, with the advice and assistance of the manager of the Rideout Bank, in which institution she and her husband had for many years been depositors.

It is also alleged that on account of the plaintiff's inexperience and ignorance of business she constantly and continuously advised and consulted with the Rideout Bank with relation to all of her business and financial affairs, and relied wholly and exclusively on the bank for counsel and advice.

The complaint then alleges that on December 27, 1920, the plaintiff executed and delivered to defendant Finney an agreement, by the terms of which plaintiff agreed to sell to Finney the Rutherford ranch for \$9,200, subject to the incumbrances, payable in three annual installments. Upon the execution of this agreement the plaintiff was to deliver to the Rideout Bank a deed thereof, with instructions to deliver the same to Finney upon full payment of the purchase price. In accordance with this agreement plaintiff deposited with the bank a deed to the Rutherford ranch, and the specified price having been paid in accordance with the terms of the contract, the deed was delivered to Finney.

When the foregoing agreement was executed the indebtedness secured by the deed of trust on the Rutherford ranch was past due and unpaid, and a portion of the indebtedness secured by the mortgage on the Home place was also overdue, and the balance payable on demand, which facts were known to Finney, and to L. C. Taylor who, for at least two years prior thereto, had been the manager of the bank, and who, as such manager, transacted for the bank its general banking business.

The complaint then alleged that the Rideout Bank, through its manager, Taylor, and for and on behalf of itself and Finney, undertook to fraudulently induce and coerce the plaintiff to execute the Finney agreement, and falsely and fraudulently represented to plaintiff as a fact, by way of pretended counsel and advice, that if she did not execute the Finney agreement and sell the Rutherford ranch to Finney, the bank would foreclose its mortgage on the Home place, and she would thereby lose her home, and that the holders of the deed of trust on the Rutherford ranch would then foreclose and take that property away from her before she could find buyers therefor; that it would be better for her to sell the Rutherford ranch for \$5 an acre than to have that property taken from her by the holders of the deed of trust, and that it was to her best interest and advantage, in view of the circumstances, to execute said agreement, and that the consideration which she was receiving from Finney for the Rutherford ranch was fair. The complaint then alleges that plaintiff, relying upon said statements and representations and the advice and counsel of the bank, executed the Finney agreement and sold the Rutherford ranch to

Finney for the sum of \$23 per acre, whereas its reasonable market value at the time was \$75 per acre.

It is also alleged that plaintiff continued to believe these representations until September, 1927, and at no time prior thereto had she any occasion to question the good faith thereof. However, in September, 1927, plaintiff alleges she obtained information that Finney had paid Taylor \$2,500 to induce him, as manager of the defendant Rideout Bank, to make the representations to plaintiff. Prior to September, 1927, so it is alleged, plaintiff had no knowledge of the fraud and deceit practiced upon her. It was also alleged that in 1923, the Rideout Bank was sold to the Bank of Italy, and in 1930, the name of the bank was changed to Bank of America National Trust & Savings Association, and the present institution is the successor of the Rideout Bank.

The answer of the bank denies that a confidential relationship existed between the Rideout Bank and plaintiff, and denies that the bank, through Taylor, or at all, induced plaintiff to execute the Finney agreement. It also denies the allegations of the complaint relating to the discovery of the alleged fraud, and as a separate defense sets up the statute of limitations as a bar.

The court found all of the allegations of the complaint to be true, and also found that during intermittent periods of many months' duration for many years prior to the death of plaintiff's husband in April, 1923, he was incompetent and confined in a hospital, and that the Rutherford ranch at the time of the Finney agreement consisted of 1840 acres and had the value of \$30 per acre.

From the evidence it appears that Taylor, during a portion of the time in question, was manager of the Gridley branch of the Rideout Bank and was employed to manage its banking business, and that Finney, a real estate operator, desiring to purchase the Rutherford ranch, agreed with Taylor to pay to him a secret commission if he would assist him in obtaining the deed from Mrs. Rutherford, and in accordance with this agreement Finney did pay to Taylor a secret commission of \$2,500 for his services in obtaining the agreement.

It is undisputed that the Rutherfords had an account with the Gridley branch of the Rideout Bank, which was opened in 1917, and that Mrs. Rutherford had other accounts with the bank, such as guardian of her husband's estate, and that various trans-

actions were had between the Rutherfords and the bank, and that they borrowed money from time to time to carry on their farming operations.

It is also in evidence that when Mr. Rutherford first became ill in 1910, Mrs. Rutherford went to the Gridley branch of the bank and told Mr. Biggs, who was then manager, that Mr. Rutherford was about to go to the hospital and that the management of the ranch would fall upon her. Mr. Biggs then told Mrs. Rutherford that he would help her manage her affairs, and to do nothing without first consulting him. This arrangement was carried on, and Mr. Biggs very honestly and efficiently and fairly counseled and advised Mrs. Rutherford in the operation of the ranches and the selling of the products therefrom during all the time that he was manager of the Gridley branch, and upon his leaving the bank the same arrangement was continued with Mr. Taylor, who continued to advise her in her business affairs.

Plaintiff contends that a confidential relationship was thus created between herself and the bank, and that such relationship existed when the fraud was committed and continued to exist until within three years of the commencement of this action, which was in November, 1927. Plaintiff further contends that when Taylor committed the fraud he was engaged in the discharge of his duties, in that at the time he was attempting to collect the indebtedness of plaintiff to the bank by threatening to foreclose the indebtedness on the Home place, and that therefore the bank was liable for all his acts.

The bank maintains that there was no confidential relationship between itself and plaintiff, and that Taylor in causing plaintiff to sell to Finney was acting beyond the scope of his authority, and that the bank therefore cannot be held liable for his fraud; and secondly, assuming that plaintiff had a cause of action against the bank, the claim is nevertheless barred by limitations. Appellants also contend that the failure of the court to find upon the issues raised by the plea of the statute of limitations was erroneous and that the judgment is not supported by the findings.

Let us first consider the contention that a confidential relationship existed between plaintiff and the bank.

The testimony of plaintiff shows that she was inexperienced in business matters, and that when Mr. Rutherford was taken

sick, she, at the invitation of Mr. Biggs, the then bank manager, consulted him as to all business matters. There is no question but what Mr. Biggs treated Mrs. Rutherford with absolute fairness and discharged his trust with the highest integrity. When he was transferred to another bank in 1919 he introduced her to his successor, Mr. Taylor; told her he was the new manager, and told her she could discuss her affairs with him and that she could trust him. Under Taylor's administration she did consult him as to her business matters and followed his advice as she had that of Mr. Biggs.

[1] There is no dispute between counsel that if an agent in the transaction of the business of the principal commits a fraud, the latter is liable; but we cannot find support here for the claim of plaintiff that the record discloses that Taylor was engaged in the transaction of the business of the bank when he committed the fraud. Plaintiff claims that when Taylor committed the fraud he was seeking to collect a debt due the bank, and was threatening plaintiff with foreclosure of the mortgage on the Home place in order to accomplish this purpose. It is true the complaint alleged that Taylor did so represent to plaintiff, but the complaint also avers that this representation was false and the court so found.

The fact is that when Taylor committed the fraud he was, as shown by plaintiff's own testimony, engaged in a conspiracy with Finney, to induce plaintiff to sell her property to Finney and had no relation to the performance of any duty to the bank. He was not serving the bank, but was advancing the selfish and personal interests of himself and Finney. There is no claim the bank profited to any degree in the secret commission, and there is no showing that the officers or directors of the bank knew of or ratified Taylor's fraud.

[2,3] Taylor was employed as manager of the branch bank to conduct its general banking business. By banking business is generally meant the acceptance of money for deposit, the discounting of bills and notes, and the making and collection of loans, but it does not include the sale of the property of the customers of the bank as a broker for commission. If the bank had empowered its officers to engage in such a business so foreign to the generally accepted understanding of the activities of a bank, the burden rested upon plaintiff to establish that fact, which she failed to

do. *Perkins v. Pacific Fruit Exchange*, 132 Cal.App. 278, 22 P.2d 535. It must also be recalled that the property sold to Finney was the Rutherford ranch, upon which the bank had no loan; its loan being on the Home place.

[4] It cannot be held that the employees of a bank may act as counselors and advisors to its depositors or borrowers, and that the bank thereby becomes responsible for their acts. This would impose an unjust liability upon the bank. The interests of the bank as well as the interest of the public require that the liabilities of the bank be definitely known, and if the officers of a bank, by undertaking to act as investment counselors, could create a confidential relationship between the bank and its customers, and subject the bank to the obligations of a fiduciary, obligations and liabilities would thereby be imposed upon banks which might threaten their stability, and of which liability the public or a depositor could have no notice. We fail to see that there was any confidential relationship established between the bank and plaintiff.

[5] The next point urged for reversal by appellant is that assuming that Taylor was acting within the scope of his authority, nevertheless the claim of plaintiff was barred by the statute of limitations. The evidence shows that the alleged fraud was committed in December, 1920, and this action was not commenced until November, 1927. Subdivision 4, section 338 of the Code of Civil Procedure provides that an action for fraud is barred in three years, but that such action is not "to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud."

The facts constituting the fraud in the case at bar consisted of false representations made by Taylor to induce the plaintiff to sell her property at a price less than its real value. These false representations were that if she did not execute the Finney agreement and deed, the bank could and would foreclose its mortgage on the Home place, and the holders of the deed of trust on the Rutherford ranch could and would foreclose their security, and that it was to her best interests to sell, and that the consideration she was to receive was fair.

Whether or not the sale to Finney was to her best interest, and whether the consideration received by her was fair, and

whether the holder of the deed of trust would foreclose if she did not make the sale, were matters of which the plaintiff could determine for herself by the exercise of ordinary diligence.

Plaintiff claims that she was excused from exercising due diligence because of the alleged confidential relationship between herself and the bank. However, we cannot find that there was any such relationship existing between herself and the bank, and secondly, assuming that such a confidential relationship did exist between plaintiff and the bank, that relationship ceased to exist more than three years prior to the commencement of the action.

Taylor ceased to be connected with the bank in December, 1921, although plaintiff continued to have a small account in the Gridley branch until 1925, and the bank continued to hold the mortgage on the Home place until the same year. Plaintiff testified that after Taylor left the bank she did not discuss her affairs with his successor but consulted Mr. Biggs; but concerning what matters, the record does not disclose. This would appear to be very slight evidence to establish the continuance of a confidential relationship. Also, there is no evidence that Taylor or any officer of the bank continued to misrepresent the value of the ranch or attempt to prevent plaintiff from learning the facts; in truth it does not appear that any one could have prevented plaintiff from ascertaining the real value of the ranch if she had attempted to do so.

[6] While a confidential relationship may excuse a failure to use diligence in discovering a fraud, it does not give the right to shut one's eyes and do nothing, and particularly as here, where the fraud was in persuading plaintiff by false representation to sell her property below its fair price. The facts constituting this fraud were that Taylor induced plaintiff to sell her ranch at less than its real value. The payment of the commission to Finney was a motive for the fraud, but was not the fraud itself.

Plaintiff contends that where there is shown a confidential relationship the defrauded party is excused from any duty to investigate but may rest in the assurance growing out of that relation of trust and confidence. This, however, states the rule too broadly. A confidential relationship does not of itself excuse the one defrauded

from exercising any diligence, but such a relationship may be considered in determining whether the party has exercised due diligence under the circumstances, in discovering the fraud. *Simpson v. Dalziel*, 135 Cal. 599, 67 P. 1080, 1081; *Henigan v. Yolo Fliers Club*, 208 Cal. 697, 284 P. 906. In *Simpson v. Dalziel*, supra, the court, sustaining a demurrer to the complaint, said: "The only excuse for what otherwise would appear to be gross negligence on the part of the plaintiff is that his confidence in this attorney was such that he had no reason to suspect and did not suspect that fraud was being perpetrated upon him. But this confidence did not absolve the plaintiff from the exercise of reasonable or ordinary care."

In the case at bar plaintiff claims she had such confidence in the bank and its officers that she did not suspect Taylor; but that was the claim in the *Simpson Case*, supra. The slightest inquiry on the part of plaintiff would have disclosed the true value of the lands, and an inquiry of the holders of the liens on her land would have informed her as to their intentions. Natural curiosity as well as business prudence should have compelled her to make the inquiry, and her failure to make some investigation was, as said in the *Simpson Case*, supra, inexcusable negligence.

Also, between the sale of the property and the death of Mr. Rutherford in 1923, he was at home intermittently for months at a time, managing their affairs. It seems natural to assume that during these intervals he and Mrs. Rutherford must have discussed the sale of the ranch and its value.

Plaintiff cites several cases where fraud was done in secret and was kept concealed. Such was the situation in *Shiels v. Nathan*, 12 Cal.App. 604, 616, 108 P. 34; *Victor Oil Co. v. Drum*, 184 Cal. 226, 193 P. 243; *Prewitt v. Sunnymead Orchard Co.*, 189 Cal. 723, 209 P. 995. Here the fraud was not and could not have been done in secret, and could not have been kept concealed.

Plaintiff attempts to weaken or distinguish the case of *Phelps v. Grady*, 168 Cal. 73, 141 P. 926, but it seems to us the principles there stated are entirely applicable to this case.

We are of the opinion from an examination of the record, and a study of the able and voluminous briefs of both parties that Taylor, when he committed the fraud, was engaged in a conspiracy with Finney

to induce plaintiff to sell her property to Finney, and when doing this he was not engaged in the business of the bank, and therefore the bank cannot be held for the acts of one not engaged in the transaction of its business, and also, the claim of plaintiff is barred by the statute of limitations, and the trial court erred in failing to so find upon that issue.

For the foregoing reasons, the judgment is reversed.

I concur: THOMPSON, J.



**TAYLOR v. OAKLAND SCAVENGER CO.
et al.***

Civ. 10609.

District Court of Appeal, First District,
Division 2, California.

Jan. 11, 1938.

Hearing Granted by Supreme Court
March 10, 1938.

1. Schools and school districts $\S$ 89

Provision of School Code permitting recovery from school district for its negligence must be strictly construed. School Code, § 2.801, as amended by St.1931, p. 2487.

2. Schools and school districts $\S$ 89

A school district is not liable under statute for negligence unless it acts without that care which a person of ordinary prudence would exercise under the circumstances or fails to observe, for protection of interest of another person, that degree of care which the circumstances justly demand. School Code, § 2.801, as amended by St.1931, p. 2487.

3. Schools and school districts $\S$ 89

Under statute, school districts may make and enforce such regulations of vehicular traffic using school premises as are necessary if they so determine but, if they do not, general provisions of the Vehicle Code apply. St.1935, p. 176, § 511; p. 196, §§ 603, 603(c).

4. Constitutional law $\S$ 70(1)

Whether any special regulations covering traffic on school grounds should be made by school district under authority of statute providing that, when school authorities

shall not make special regulations for such traffic, the general provisions of the Vehicle Code apply, is a purely legislative matter and not a matter for the court or jury to determine. St.1935, p. 176, § 511; p. 196, §§ 603, 603(c).

5. Evidence $\S$ 25(2)

It is common knowledge that many of school districts have provided roads and driveways for vehicular traffic over school grounds for accommodation of pupils, teachers, and the public.

6. Schools and school districts $\S$ 89

The use of facilities provided for vehicular traffic over school grounds is not such a rare occurrence that a court could say as a matter of law that special regulations should be enacted by the school authorities to govern the traffic. St.1935, p. 196, § 603(c).

7. Officers $\S$ 141

If special circumstances arise which would warrant a court in supervising the quasi legislative acts of an administrative body, such circumstances should be pleaded.

8. Constitutional law $\S$ 70(1)

Rules of conduct are legislative rather than judicial in character and, when the Legislature fixes rules of conduct to be observed under circumstances, the courts may not declare that different rules should be observed.

9. Constitutional law $\S$ 74

The exercise of power to enact rules of conduct which is given to an agency of the state is discretionary with the agency and is not subject to judicial control.

10. Schools and school districts $\S$ 55

The authorities of a school district could not restrict the disposal of school garbage, since such disposal is a local police affair under control of municipality. Const. art. 11, § 11.

11. Schools and school districts $\S$ 89

A school district was not negligent in not enacting special regulations in addition to those found in general statutes for control of vehicular traffic on school grounds, and hence was not liable for alleged negligence in failing to enact regulations which would have prevented garbage truck which periodically entered school grounds for removal of school garbage from negligently striking pupil while on school premises. St. 1935, p. 176, § 511; p. 196, §§ 603, 603(c);

School Code, § 2.801, as amended by St.1931, p. 2487.

12. Schools and school districts ⇨89

A school district was not liable for injuries sustained by pupil while on school grounds when she was struck by negligently driven garbage truck because district failed to provide traffic controls as it was authorized to do under statute. St.1935, p. 176, § 511; p. 196, §§ 603, 603(c); School Code, § 2.801, as amended by St.1931, p. 2487.

13. Schools and school districts ⇨89

A school district was not liable for injuries sustained by sixteen year old pupil while on school grounds when pupil was struck by negligently driven garbage truck entering school premises to remove garbage, where pupil was in possession of all her faculties and the school authorities and school employees took no part in negligence of operator of the truck. School Code, § 2.801, as amended by St.1931, p. 2487.

14. Pleading ⇨225(1)

That trial court did not give a plaintiff leave to amend her complaint after demurrer was sustained was not error where plaintiff did not apply at any time for such leave.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Eleanor Taylor, a minor, by her guardian ad litem, Frank B. Taylor, against the Oakland Scavenger Company, the Oakland High School District of Alameda County, and others for injuries sustained by plaintiff when struck by a garbage truck owned and operated by the Oakland Scavenger Company, while she was on the premises of the Oakland High School District of Alameda County. From a judgment for the Oakland High School District of Alameda County after its demurrer to the complaint was sustained, the plaintiff appeals.

Affirmed.

Crozier C. Culp and Elliott Johnson, both of Oakland, for appellant.

Earl Warren, of Oakland, and Charles V. Barfield, of San Francisco, for respondent.

NOURSE, Presiding Justice.

The minor plaintiff sued through her guardian for damages for personal injuries

suffered by her when struck by a garbage truck owned and operated by the Scavenger Company. The injuries occurred while the truck was gathering garbage from the school grounds, and the school district was joined on the theory that it was negligent in failing to prevent the injuries. A demurrer both general and special was filed by the school district, and was sustained without leave to amend. The plaintiff did not seek permission to file an amended complaint, but comes here on an appeal from the judgment in favor of the school district.

The plaintiff was a regularly enrolled pupil in the Castlemont High School maintained by the defendant school district in the city of Oakland. As a member of the class in physical education, she was required, with the other members of the class, to cross a portion of the school premises from the gymnasium to the playgrounds. While following this course she was struck by the garbage truck, but the complaint does not state where this occurred other than that it was within the school premises. The pertinent portions of the complaint are: "while plaintiff, Eleanor Taylor, in the company of the other young ladies who were members of the aforesaid physical education class, was proceeding, under the care, supervision and control of the said Claire M. Johnston (the teacher), from the aforesaid gymnasium building to the aforesaid playgrounds where the aforesaid class in physical education was to be held and conducted, and while said plaintiff, Eleanor Taylor was following the usual and regular course to said playgrounds, which said course lay wholly within the private bounds and confines of the premises of said Castlemont High School, defendant, Albert Santucci, did then and there so recklessly, carelessly, and negligently drive, operate and propel the aforesaid Ford garbage truck upon, across and wholly within the bounds and confines of the said grounds, playgrounds and premises of the said Castlemont High School, that the said Ford garbage truck and then and there come into violent contact with the body of the said plaintiff, Eleanor Taylor, and did then and there with great force and violence, knock, hurl and throw the said plaintiff, Eleanor Taylor, to and down upon the paved and graveled surface of the ground at said place."

Negligence is charged to the school district in the following language:

"That said defendant, Oakland High School District of Alameda County, and its said agents, servants and employees, * * * were fully aware of the danger and peril to students of the said Castlemont High School arising from and occasioned by the operation of motor vehicles over, upon and within the bounds and confines of the grounds, playgrounds, and premises of the said Castlemont High School during regular school hours, and while regularly scheduled physical education classes were being held and conducted upon said grounds, playgrounds and premises of said High School, and while students were passing to and from the aforesaid Gymnasium Building and the aforesaid playgrounds, but that said defendant, * * * negligently and carelessly failed, neglected and omitted to furnish, install, provide, formulate, or to place or put into effect or operation, any device, safeguard, safety measure, rule or regulation of any nature whatsoever to prevent the aforesaid injuries. * * *

"That the aforesaid respective specified acts of negligent omission on the part of the defendant, Oakland High School District of Alameda County, and its aforesaid agents, servants, and employees, and the aforesaid acts of negligent commission on the part of the defendants, Oakland Scavenger Company, a corporation, * * * operated singly and independently and proximately to cause, bring about and produce, and did singly, independently and proximately cause, bring about and produce the aforesaid injuries sustained."

It is at once apparent that appellant rests her charge against the school district upon no affirmative act of negligence, but relies wholly upon the failure to provide such safety devices and rules and regulations as would make such accidents impossible, notwithstanding the independent negligent acts of third parties. The respondent rests its case upon the theory that the garbage truck was using the school premises under state-wide regulations found in the Vehicle Code, St.1935, p. 93, as amended, and that plaintiff's injuries were attributable solely to the negligence of its codefendant, who was not under the supervision or control of the school district.

[1,2] The action was brought under the provision of section 2.801 of the School Code, as amended by Stats.1931, p. 2487, which permits recovery for injuries arising "because of the negligence of the district, or its officers or employees." Since

this statute has created a new liability upon the school districts, it must be strictly construed. *Cook v. Superior Court*, 12 Cal. App.2d 608, 55 P.2d 1227; *Weber v. Pinyan*, Cal.Sup., 70 P.2d 183, 112 A.L.R. 407. Hence, it is necessary to find in the charge of negligence on the part of the school district a "want of such care as a person of ordinary prudence would exercise under the circumstances," or a "failure to observe, for the protection of the interest of another person, that degree of care, protection and vigilance which the circumstances justly demand." 19 Cal.Jur. p. 548.

[3-11] To meet these demands, the appellant alleged that the school authorities failed to provide any "safety measure, rule or regulation of any nature whatsoever to prevent the aforesaid injuries." In support of the pleading, the appellant argues that it was the duty of the school authorities to enact all necessary rules to prevent such accidents, and in this regard suggests that they might have provided an officer to meet every vehicle at the gates and to walk slowly ahead of each vehicle sounding a warning to the students of the approaching danger; that they might have called a general assembly and warned all the students that there was danger in moving motor vehicles and that they should use special care in going from the dressing rooms to their physical education classes; that they might have provided small hand trucks for the delivery of supplies and for the removal of garbage; and that they might have erected "stop signs" or other signals to control the operation of vehicles within the school grounds. The respondent replies that the rules for the control of traffic over school premises have been fixed by state-wide regulations made by the Legislature and found in the Vehicle Code. Section 511, St.1935, p. 176, provides speed limits for vehicles when traversing school grounds. Section 603, St.1935, p. 196, limits the right to operate a vehicle upon school grounds except upon permission of the school authorities. Subdivision (c) of that section provides that, when no special conditions or regulations have been imposed by the school authorities, "all the provisions of this code relating to traffic upon the highways shall be applicable to such traffic upon said driveways, paths or grounds." Here it is alleged that vehicular traffic was permitted by the school authorities and that no special conditions or regulations were imposed. It follows that such traffic was

subject to all the regulations and provisions of the Vehicle Code. The purpose of the Code sections is clear. If the school authorities determine that special regulations of vehicular traffic are necessary they are authorized to make and enforce such regulations. But, if the school authorities determine that special regulations are not necessary, then the Legislature has declared that the provisions of the Vehicle Code shall apply. These matters are purely legislative, and it is not a matter for the court or jury to determine whether any rule, regulation, or restriction covering such traffic should be made. It is a matter of common knowledge that many of our school districts have provided roads and driveways for vehicular traffic over school grounds for the accommodation of the pupils, the teachers, and the public having business with the schools. The use of these facilities is not of such a rare occurrence that a court could say as a matter of law that special rules and regulations should be enacted to govern the traffic. There is nothing unusual or inherently dangerous in a garbage truck which periodically enters the school grounds for the removal of garbage. We are not aware of any case in which a court would have jurisdiction to supervise the quasi legislative acts of an administrative body of this kind, but, if some special circumstances should arise which would warrant a court in exercising such jurisdiction, those circumstances should be pleaded. That some court or jury might deem certain regulations expedient is beside the question. Rules of conduct are legislative rather than judicial in character, and, when the sovereign state, acting through its legislative branch, fixes the rules of conduct to be observed under certain circumstances, it is not within the power of the courts to declare that different rules should be observed. The situation is not changed when the Legislature gives to one of its agencies power to enact additional rules. Assuming that the Legislature may make this delegation of power, the exercise of the power is discretionary with the agency and is not subject to judicial review or judicial control. Certainly the school authorities could not restrict the disposal of garbage as that is a local police affair under the control of the municipality. Article 11, § 11, Const. We, therefore, conclude that, in so far as the case rests on the failure of the school authorities to enact additional regulations

to those found in the general statutes, the complaint fails to state a cause of action.

[12] For like reasons no cause of action is stated in relation to the failure of the school authorities to provide traffic signals and traffic controls. The Legislature has declared that these things may be done, but that, if they are not done, then the conduct of all parties is regulated by the general laws. This is but another way of saying that, if the school authorities do not deem it necessary to adopt other methods, the rules of conduct applicable to all parties shall be those found in the statutes. Thus, in the absence of such local regulations, the state has elected to determine what is reasonable and prudent in regard to the control of such traffic. Applying the rule of strict construction to section 2,801 of the School Code, which imposes upon the school districts liability for "negligence," the inevitable conclusion follows that the Legislature did not intend to fix liability upon a district because of conduct which, by express legislative action, was declared to be reasonable and prudent.

[13] In cases of this type the judgments which have charged the school districts with liability have generally rested upon a showing of some dereliction on the part of the teacher or employee. This is not such a case. The complaint alleges that the appellant was under direct supervision of the instructor, following the usual and regular course from the gymnasium to the playgrounds. There is no allegation that the teacher was incompetent or that she failed in any respect in the performance of her duties. The plaintiff was sixteen years of age and presumably in possession of all her faculties. If there was any inherent danger in the operation of the garbage truck, it must have been known to the plaintiff. The complaint alleges that all the school authorities, including this teacher, were fully aware of the danger and peril to the students occasioned by the operation of motor vehicles generally over the school grounds. This is but an abstract statement of the commonplace—that people know that motor vehicles are dangerous if operated negligently. But there is no allegation of mental or physical weakness on the part of the appellant which would take her out of the general class, and no allegation that the operation of the garbage truck created any special or unknown danger which

would require special supervision in reference to a girl of that age. We do not undertake to state in this opinion what allegations would be sufficient. We merely hold that this complaint does not state a cause of action against the school district. The case pleaded is simply one of a girl presumably in possession of all her faculties who was the victim of an unfortunate accident which was caused by the alleged negligence of the operator of the truck, but in which the school authorities and the school employees took no part.

[14] The objection that the trial court failed to give appellant leave to amend is not available at this time because she did not make any application to the trial court at any time for such leave. Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 706, 16 P.2d 268.

The judgment is affirmed.

We concur: STURTEVANT, J.;
SPENCE, J.



24 Cal.App.2d 382

**MITCHELL et al. v. SHORERIDGE OIL
CO. et al.***

Civ. 1668.

District Court of Appeal, Fourth District,
California.

Jan. 13, 1938.

Hearing Denied by Supreme Court
March 14, 1938.

1. Assignments ⇨34

An assignment of claims without consideration for the purpose of collection need not be in writing.

2. Mechanics' Liens ⇨204

A mechanic's lien is a mere incident of the debt which it secures, and an assignment of the debt carries the lien with it.

3. Mechanics' Liens ⇨204, 262(2)

The assignee of claims for materials furnished became the legal owner of the claims and the mechanics' liens securing their payment and became the proper party to enforce collection of the debts as well as to foreclose the liens, notwithstanding that

assignment was without consideration and for purpose of collection only.

4. Mechanics' Liens ⇨214

Claims for materials furnished became merged in judgment rendered in action to enforce collection, and entry of judgment waived right to foreclose mechanics' liens securing payment of the claims.

5. Mechanics' Liens ⇨214

Assignor of claims upon which assignee for collection had secured judgment was not entitled to foreclosure of mechanics' liens securing payment of the claims, notwithstanding assignee's knowledge and consent to institution of the action, since not only was assignee proper party to enforce collection, but entry of judgment on the claims waived right to resort to the liens.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by A. D. Mitchell, doing business under the fictitious name and style of the Coast Supply Company, and another against the Shoreridge Oil Company and another and against Azell T. Freeman, executor of the estate of Lucy B. Freeman, deceased, to subject real property which had been owned by Lucy B. Freeman to mechanics' liens for materials furnished by plaintiffs to the first-named defendant as lessee. Judgment in favor of the last-named defendant, and the plaintiffs appeal.

Affirmed.

Raphael Dechter, of Los Angeles, for appellants.

Jesse R. Shafer, of Los Angeles, for respondent.

JENNINGS, Justice.

By their amended complaint filed in this action in the superior court of Orange county on August 7, 1935, plaintiff sought to subject real property owned by the defendant Lucy B. Freeman to mechanics' liens for materials furnished by them to the defendant's lessee, Shoreridge Oil Company, to foreclose such liens, and to obtain a decree that the land be sold for the purpose of satisfying the liens. In her answer filed to said amended complaint Lucy B. Freeman alleged that prior to the institution of this action plaintiffs had assigned the claims and demands which they asserted to one D. Aarup,

*Hearing denied 77 P.2d 221.

that said assignee on February 6, 1935, commenced an action in the superior court of Los Angeles county against the Shoreridge Oil Company and others on such demands, and that judgment was rendered in favor of the assignee against the defendants in said action on August 7, 1935, whereby it was adjudged that the assignee should have and recover from said defendants the amount demanded in said action on said demands. During the trial of the issues framed by the pleadings in the instant action evidence was produced which indicated that prior to the bringing of this suit plaintiffs had assigned their claims upon which the liens here sought to be foreclosed were based to the person named in the above-mentioned answer, that such assignment was oral and was for collection only, that the assignee had instituted an action on such claims in Los Angeles county and had recovered a money judgment against the Shoreridge Oil Company and the other defendants named in said action. On these facts the trial court in this proceeding found that plaintiffs had no interest in the liens which they asserted or in the subject-matter of the causes of action which they here alleged and rendered judgment in favor of the defendant, Lucy B. Freeman. From the judgment thus rendered plaintiffs appeal.

Appellants contend that, since the evidence showed that the assignment of their claims was oral and was made only for the purpose of collection and they received no consideration for such assignment, they retained the equitable interest in such claims and were therefore empowered to bring this proceeding to foreclose the liens in their own names.

[1-4] With respect to the fact that the assignment of the claims for the purchase price of the materials furnished by appellants was oral it is settled that there is no legal requirement that such an assignment must be in writing. It is also settled that a mechanic's lien is a mere incident of the debt which it secures and that the assignment of the debt carries with it the lien. *Union Supply Co. v. Morris*, 220 Cal. 331, 338, 30 P.2d 394. When, therefore, appellants assigned their claims for money due them for materials, as the evidence showed they did, the liens which the law gave them by way of security passed to the assignee,

who thereupon became entitled to enforce such liens. The fact that the assignment was made merely for the purpose of collecting the amounts due on the claims and that appellants received no consideration for the assignment is of no importance. The assignee nevertheless became the legal owner of the claims and the liens which secured their payment. *Toby v. Oregon Pac. R. Co.*, 98 Cal. 490, 497, 33 P. 550; *Cortelyou v. Jones*, 132 Cal. 131, 132, 64 P. 119; *Ingle Mfg. Co. v. Scales*, 36 Cal.App. 410, 172 P. 169. By the assignment made as indicated the assignee became the proper party not only to enforce collection of the debts but also to foreclose the liens which, as heretofore observed, passed as incidents of the debts. Without reassignment to them which the uncontradicted evidence showed had not been made appellants were not empowered to institute the instant action. *Tuller v. Arnold*, 98 Cal. 522, 33 P. 445. Finally, it must be observed that not only had the assignee of appellants instituted a prior action to enforce collection of the claims, but that, as the evidence of appellants themselves showed, this prior suit was prosecuted to judgment which was rendered in favor of the assignee for the amount for which the liens here attempted to be foreclosed were the security provided by the law. It is apparent that the demands asserted in the prior action became merged in the judgment rendered therein, and the entry of such judgment operated as a waiver of the rights of appellants to seek the remedy of foreclosure on the principle of estoppel. *California Nat. Supply Co. v. Porter*, 83 Cal.App. 758, 763, 257 P. 161.

[5] Appellants complain that, the trial court erred in refusing to admit evidence which they attempted to introduce, the purpose and effect of which was to show that the present action was brought with the knowledge and consent of their assignee. No error was committed by the ruling thus made. The knowledge and consent of the assignee to the institution of this action was immaterial, in view of the undisputed facts disclosed by the record herein to which reference has been made in this opinion.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

24 Cal.App.2d 385

**WOOLFORD v. ELECTRIC APPLIANCES,
Inc., et al.**
Civ. 5876.

District Court of Appeal, Third District,
California.

Jan. 14, 1938.

1. Landlord and tenant ⇨152(3)

In action by lessee of stall in market for lessor's failure to furnish efficient refrigeration plant as required by lease, entire lease was required to be considered for purpose of determining intention of parties thereto.

2. Landlord and tenant ⇨152(3)

Where lease of stall in market, executed before erection of market, provided that stall should be used for meat market and lease required lessor to furnish refrigeration equipment, lessor was liable for loss resulting from inefficient refrigeration equipment furnished, since there was implied warranty that refrigeration equipment would be reasonably adequate for purpose of meat market.

3. Landlord and tenant ⇨125(2)

Where property leased is not in existence at time of execution of lease, the property subsequently installed by lessor must be reasonably adequate for purpose for which it was leased.

Appeal from Superior Court, Sacramento County; P. J. Shields, Judge.

Action by Clarence E. Woolford against Electric Appliances, Inc., and others, on account of defendants' failure to furnish an efficient refrigerating plant. From an adverse judgment, defendants Byron B. Davis and another appeal.

Affirmed.

Mento & Read, of Sacramento, and Charles A. Christin and T. J. Keegan, both of San Francisco, for appellants.

Clifford A. Russell and Rose M. Sheehan, both of Sacramento, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment against the appellants for the sum of \$788.26, on account of the alleged failure of said appellants to furnish an efficient refrigeration

plant. This appeal is prosecuted from said judgment.

The record shows that on or about the 22d day of June, 1934, the appellants, Byron B. Davis and Earl P. Davis, and the respondent, Clarence E. Woolford, entered into an agreement of lease of property in the city of Sacramento, wherein the appellants leased to respondent a certain portion of a structure to be erected. The structure was more specifically described as a "Drop-In" market. This market contained a great many stalls. The lease to the respondents was for a stall to be located in said market. The lease in question was for a specific purpose and contained provisions as to certain appliances to be installed by the lessors. Outside of the formal provisions of the lease there are two specifications involved in this proceeding, to wit: Paragraph No. 11 of the lease reads: "The herein demised premises shall be used for some or all of the following purposes: operation of meat market, to have the exclusive sale of all fresh meats, cured meats, smoked meats, fish and poultry, except sliced ham and bacon. Also, to have the privilege of selling all luncheon meats, bulk and package shortening and lard, bulk sourkraut, cottage cheese and sandwiches. Said premises shall not be used for any other purpose without the written consent of the owner." Paragraph 21 of the lease is in these words: "The following described fixtures and appurtenances are to be installed by the owner: Refrigeration display counters, display racks and shelving, back bar, one 'walk-in' ice-box, refrigeration machinery, rails in box, one sink, gas outlet, hot water heater."

The court found that the refrigeration plant agreed to be installed by the lessors was inefficient for the purposes contemplated by the lease; that as a result of the inefficiency of the refrigeration plant that a considerable portion of the meats attempted to be handled by the respondent spoiled, to the extent of the value of \$688 and some cents; that the respondent was also put to the additional expense of \$100, aggregating a total loss by the respondent of \$788.26.

The appellants in this cause rely upon the general principle stated in 36 Corpus Juris p. 45, as follows: "There is, as a general rule, no implied covenant upon the part of the landlord that the demised premises are fit for the purposes for which they are rented, or for the particular use for which they are intended by the tenant, or that they shall continue fit for the purposes for which they were demised, and this is true although

the landlord knows the purpose for which the tenant intends to use the premises."

[1, 2] The trial court properly held that this rule was inapplicable to the situation presented both by the lease and the testimony introduced at the trial. For the purpose of determining the intent of the parties, the court also very properly held that the entire lease should be considered; that is, that the kind of refrigeration plant agreed to be installed by the lessors should be measured by the purposes for which the lease was executed, the lease specifying the particular products to be handled by the lessee, and also, further limiting the handling of products by the lessee, save and except by the further written consent of the lessors. The efficiency of the plant necessarily depended upon its operation of sufficient capacity to preserve, fit for consumption, the products which the lease specified should be kept and offered for sale to the public by the lessee. The fixtures and appliances mentioned in the lease were not installed in the building at the time of the execution thereof. No opportunity was afforded to the lessee to inspect the same prior to the execution of the lease. Thus, the rule of caveat emptor as applied to structures already in existence had and has no application to the questions here presented. All the cases cited by the appellants, based upon that rule, constitute no authority or reason for reversing the judgment of the trial court, and hence, those cases need not be here analyzed or further considered.

A somewhat similar question was presented to this court in the case of *Morse v. Tochtermann*, 21 Cal.App. 726, 132 P. 1055, 1059, where the lease provided for the furnishing of heat, etc. Counsel for the lessors contended that as no degree of heat was specified, just as in this case no degree of refrigeration was specified, the lessors were only obligated to furnish such heat as the installed plant supplied. To this contention the court, speaking through Mr. Justice Hart, replied as follows: "Counsel for the respondents contend that, under the correct view of the foregoing language of the lease, the plaintiffs were obliged to furnish the defendants with such an amount of heat only as was 'appurtenant' to the building of which the demised premises constituted a part, or, in other words, such a degree of heat only as the heating plant installed in the hotel building was capable of supplying. We cannot assent to that construction of the lease in that particular. To the contrary, that the plaintiffs

agreed to provide the room leased to the defendants with such a degree of heat during the prevalence of cold or inclement weather as would uniformly produce, within the interior of the premises, an artificial temperature sufficient to counteract the effect of the cold weather or as would superinduce ordinary or reasonable warmth and physical comfort, is the only rational and just construction of the provision of the lease in that regard. It may be and perhaps is true that all the parties believed, at the time of the execution of the lease, that the heating plant designed to supply heat for the entire building would be sufficient at all times to perform that function; but this consideration, assuming it to be well founded, can furnish no support for the proposition that, in case the plant proved incapable, for some fault in its mechanism or installation, of supplying the necessary degree of heat, the plaintiffs were required to go no further in the discharge of their obligation to furnish the demised premises with heat."

The appellants in the instant case understood and knew the purposes for which the refrigeration plant was to be installed, and there necessarily followed the implied warranty or understanding that the plant to be installed would be reasonably adequate for preserving fit for market the products mentioned in the lease to be kept and sold by the lessee.

In the case of *Hunter v. Porter*, 10 Idaho 72, 77 P. 434, 438, a like question was there presented for consideration, and while the case was reversed for a different reason, the court in its opinion, relative to the question which we have under consideration, used the following language: "It is clear to us, from an examination of the instrument itself, that the lessor knew and understood the purpose for which the lessee was securing the premises; and, not only that, but by the terms of his lease he restricted and confined the lessee to the use of the premises for those purposes only. At the time this agreement of lease was entered into, the building was not completed, and was therefore not in a condition that the tenant could enter and examine the same to ascertain whether it met all the requirements for which he was leasing it. On the other hand, the landlord, by the implied terms of the lease, represented the building as a 'cold storage building,' and that term must be understood to have a meaning peculiar to a class or kind of building designed for the preservation and safe-keeping of such ar-

ticles and products as it was understood that the tenant meant to keep in the building." After citing a large number of authorities, the court further said: "This was more than a location and designation of the property, and amounted to a representation as to its character."

In the case of *McCready v. Bullis*, 59 Cal.App. 286, 210 P. 638, where the lease provided for the sinking of a well of a certain size, would be construed as requiring the lessor to sink a well from which the lessee might obtain a quantity of water adequate to properly irrigate the leased lands. In that case, lands which were unproductive without irrigation, were leased, and the lease provided for the sinking of an artesian well of at least 12 inches in diameter, for the purpose of obtaining water for the irrigation of the lands. It was held, as we have stated, that it was contemplated that the lessor should furnish sufficient water for the irrigation of the leased lands. It was further held in that case that the parties to the lease knew and understood that without water in sufficient quantity to irrigate the leased lands, the leased lands would be valueless. That rule applied to the instant case justifies the holding that the lessors and the lessees knew that unless a reasonably adequate refrigeration plant was installed, it would be utterly valueless for the uses contemplated. All parties necessarily understood that the degree of refrigeration should be sufficient to preserve the products mentioned in the lease to be handled by the lessee, and that if sufficient refrigeration was not supplied, the refrigeration plant would be valueless.

In the case of *Whitney v. Aronson*, 21 Cal.App. 9, 130 P. 700, where the question of furnishing heat was before the court, based upon a lease specifying the furnishing of heat for certain premises, it was held that the lease contemplated the furnishing of heat so as to render the leased premises reasonably comfortable during the winter months.

Again, in the case of *Hot-N-Kold Corporation v. Todd*, 105 Cal.App. 718, 288 P. 687, it was held in substance that it was common knowledge that a refrigerator is manufactured and intended for the keeping of food products in a wholesome condition and to prevent from spoiling. In that case a refrigeration plant was to be installed, which proved inefficient, just as in the case which

we are considering, and it was held that the lessors had not supplied an efficient plant.

In the case of *Hardman Estate v. McNair*, 61 Wash. 74, 111 P. 1059, the lease provided for the installing, or rather, arranging of the leased premises for a café and kitchen, the lessees not to use such premises for other than a café and kitchen. It was held that there was a warranty on the part of the lessors to make the premises reasonably suitable and fit for a café and a kitchen. We may here state that the cases cited by the appellant relative to property in existence, whether real or personal, have no application, for the simple reason that the lessee has an opportunity to inspect the same prior to the execution of the lease.

[3] In the case of *Bentley v. Taylor*, 39 N.W. 267, 268, Id., 81 Iowa 306, 47 N.W. 58, the court in its opinion quotes from *Wood's Landlord and Tenant* as follows: "Where a landlord lets premises for a certain purpose, and covenants or agrees that the building shall be ready for occupancy by a certain time, there is an implied covenant that the building shall be fit for occupancy for the purpose for which it was let at the time named." This, of course, enforces the rule followed by the trial court that there is a distinct difference between property in existence at the time of the execution of the lease, which the lessee has an opportunity to inspect and use his own judgment as to its fitness or adequacy for the purposes intended, and property or appliances which are either to be built or installed subsequent to the execution of the lease, and of which the lessee of course has no opportunity to inspect. In the latter case, the rule followed by the trial court was properly applied, to wit, that the property to be installed would be reasonably adequate for the purposes intended.

Other cases might be cited, but what we have said we think sufficient to show that the trial court was correct in reading the lease as a whole, and coming to the conclusion that there was an implied contract on the part of the lessors that the refrigeration plant to be installed by them should be sufficiently or reasonably efficient for the purposes intended. That this was not done does not appear to be seriously questioned.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

ZURICH GENERAL ACCIDENT & LIABILITY INS. CO., Limited, v. KINSLER et al.*

EVERSOLE v. KINSLER et al.

Civ. 5848.

District Court of Appeal, Third District,
California.

Jan. 11, 1938.

Hearing Granted by Supreme Court
March 10, 1938.

4. Attorney and client ⇨76(1)

A client was entitled to discharge her attorney in damage suit with or without cause where attorney had no interest in the subject-matter of that suit except his contingent fees to be paid in the event of recovering a judgment therein. Code Civ. Proc. § 284.

2. Attorney and client ⇨76(1)

A client may discharge her attorney at any time except when he has an interest in the subject-matter of the suit other than that which is incident to the attorney's employment, even if a contingent fee has been agreed upon and client is indebted to attorney for services performed or money advanced. Code Civ. Proc. § 284.

3. Principal and agent ⇨34

An "irrevocable power coupled with an interest" is not created unless there is a specific, present, and co-existing interest in the subject of the power or agency.

4. Attorney and client ⇨76(1)

An attorney did not have an "employment or power coupled with an interest" by virtue of contract of employment providing for payment of contingent fees, that contract was irrevocable and that it operated as an assignment pro tanto of the attorney's share of judgment which would preclude discharge of attorney by client and substituting another attorney in his stead; a "power coupled with an interest" being a power which accompanies or is connected with an interest. Code Civ. Proc. § 284.

[Ed. Note.—For other definitions of "Power Coupled with an Interest," see Words & Phrases.]

5. Attorney and client ⇨134(2)

An attorney who is discharged before he has fulfilled the services which he contracts to perform for a contingent fee may recover as damages the reasonable value of services which he actually rendered, and he

is not ordinarily entitled to recover the entire contingent fee. Code Civ. Proc. § 284.

6. Attorney and client ⇨76(1)

The purported assignment to attorney of one-third of judgment to be rendered in damage suit as a contingent fee for services of attorney in such suit did not create an "employment coupled with an interest" so as to preclude discharge of the attorney by the client. Code Civ. Proc. § 284.

7. Attorney and client ⇨134(1)

When an attorney is properly discharged, his fees may be fixed by the court in a proceeding therefor, independently of a contract for contingent fees, based upon reasonable compensation for services actually performed, in absence of statute.

8. Attorney and client ⇨134(2)

Under contract by which client agreed to pay attorney one-third of recovery in damage suit in which attorney represented client, attorney had no right of action until judgment was recovered, and hence where attorney was discharged before judgment, statute providing that, when an attorney whose fee is contingent upon the recovery of money is discharged before judgment, the court shall determine fee to be paid which was enacted after execution of contract but before judgment was rendered was applicable. Code Civ. Proc. § 284.

9. Attorney and client ⇨134(2)

In interpleader suit to determine disposition of money due under judgment for plaintiff in damage suit, where plaintiff had agreed to pay attorney who first represented her one-third of amount recovered, but subsequently discharged attorney and procured others, findings that plaintiff in damage suit was justified in discharging her attorney were not necessary, since attorney had no interest in the subject-matter of the suit other than that which was incident to his employment and hence could be discharged by plaintiff with or without cause. Code Civ. Proc. § 284.

10. Attorney and client ⇨134(2)

Evidence held to sustain findings that client who had agreed to pay attorney representing her in damage suit one-third of the amount recovered under agreement providing that the contract was irrevocable and that it should operate as an assignment pro tanto, was justified in discharging her attorney. Code Civ. Proc. § 284.

*For subsequent opinion see 81 P.2d 913.

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Suit in interpleader by the Zurich General Accident & Liability Insurance Company, Limited, against Anna Kinsler, Keith C. Eversole, and Phillips & Munck, to determine the disposition of amounts due under judgment for Anna Kinsler in a damage suit, in which Keith C. Eversole, who was succeeded by Phillips & Munck, represented Anna Kinsler as attorneys, and wherein Keith C. Eversole filed a cross-complaint naming Maurice E. Kinsler and others cross-defendants. From a judgment awarding Keith C. Eversole less than the amount claimed by him and directing the balance of the funds to be paid to Anna Kinsler, Keith C. Eversole appeals.

Affirmed.

W. H. Brunner, of Ukiah, for appellant.

Phillips & Munck, of Oakland, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

This is an appeal from a judgment rendered in an action in interpleader instituted under section 386 of the Code of Civil Procedure, involving the right of a discharged attorney to collect contingent fees under a contract therefor.

The appellant, Keith C. Eversole, was an attorney at law residing at Ukiah. Anna Kinsler was injured in an automobile casualty through the negligence of L. P. Anker. She employed this appellant to bring suit for damages against Anker. She signed a contract with Eversole, agreeing to pay him one-third of the amount of whatever judgment might be recovered as compensation for his services. The fees were made payable "upon the receipt by * * * (Kinsler) of any sum or sums therein." It was provided that the contract was irrevocable, and that it should "operate as an assignment pro tanto" of the attorney's share of the judgment. It also contained a clause agreeing to pay appellant "reasonable attorney's fees" in the event of the necessity of instituting suit to collect the contingent compensation. Eversole prepared and filed in Mendocino county a complaint for damages against Anker.

Differences arose between the attorney and client. June 30, 1935, Mrs. Kinsler notified her attorney in writing that he was discharged. July 2, 1935, Eversole consented in writing to a substitution of the law firm of Phillips & Munck, as attorneys,

but then informed her that he would insist upon payment to him of the full one-third of whatever judgment she might recover in that suit. The case was tried by the firm of Phillips & Munck, and a judgment for the sum of \$2,000 and costs was rendered. December 10, 1935, Zurich General Accident & Liability Company, Limited, which was the insurer of the defendant, Anker, in that suit, then filed this suit in interpleader under the provisions of section 386 of the Code of Civil Procedure against the parties to the damage suit and Keith C. Eversole, and paid into court the full amount of the judgment in the sum of \$2,000 and costs, asking that the court distribute the funds to the parties entitled thereto, and that it be exonerated from further liability. To that complaint the respective parties answered, and Eversole also filed a cross-complaint, setting up his contract with Anna Kinsler for contingent fees, and alleging he is entitled to one-third of the judgment of \$2,000 which she recovered. To this cross-complaint Anna Kinsler filed an answer, alleging a breach of the contract on the part of Eversole by conduct which rendered it "impossible" for him to continue the litigation as her attorney or to properly represent her interests therein. The answer to the cross-complaint alleges in detail the specific inimical acts of her former attorney which she asserts required a substitution of counsel. This cause was tried by the court sitting without a jury. Findings were adopted favorable to the respondent Kinsler.

The court determined that the conduct of the attorney, Eversole, made it impossible for him to properly perform the services of an attorney in the damage suit or to conserve the interests of his client, Kinsler, and that she was authorized to and did formally discharge him as her attorney and did substitute in his place the firm of Phillips & Munck, which substitution was accepted by Eversole; that the purported assignment of one-third of the judgment recovered was rendered void; that Eversole was not entitled to recover the contingent fee specified in the contract, but that his services were reasonably worth the sum of \$75. Judgment was thereupon rendered awarding the appellant the sum of \$75 for services performed, and the balance of the fund was directed to be paid to Anna Kinsler. From that judgment this appeal was perfected.

[1,2] The respondent Anna Kinsler was authorized to discharge her former

attorney in the damage suit, with or without cause, for the reason that he had no interest in the subject-matter of that suit except his contingent fees to be paid in the event of recovering a judgment therein. It is now settled law in California that a client may discharge her attorney at any time, except when he has an interest in the subject-matter of the suit other than that which is incident to his employment, even though a contingent fee has been agreed upon and she is indebted to him for services performed or money advanced. Section 284, Code Civ.Proc.; 3 Cal.Jur. 628, § 38; Scott v. Superior Court, 205 Cal. 525, 271 P. 906; O'Connell v. Superior Court, 2 Cal.2d 418, 41 P.2d 334, 335, 97 A.L.R. 923, note; Hamlin v. Case & Case, 188 Wash. 150, 61 P.2d 1287, 1288; Cavers v. Old Nat. Bank & Union Trust Co., 166 Wash. 449, 7 P.2d 23; Martin v. Camp, 219 N.Y. 170, 114 N.E. 46, L.R.A. 1917F, 402; Crosby & Fordyce v. Hatch, 155 Iowa 312, 135 N.W. 1079; 6 C.J. 676, § 193.

[3,4] When an attorney's only interest in the subject-matter in litigation which he is conducting in behalf of his client is the payment of a contingent fee to compensate him for his professional services, it may not be said his employment is "coupled with such an interest" as will preclude the client from discharging him and substituting another attorney in his stead. O'Connell v. Superior Court, *supra*. In the case last cited a writ of mandamus was issued to compel the court to recognize the right of substitution of attorneys under circumstances similar to the facts in this case, notwithstanding the fact that the client had executed a written agreement with his attorney to pay him as compensation for his services one-half of whatever sum he succeeded in collecting "by suit or compromise" of a claim to property affected by an alleged invalid assignment thereof. Speaking of the "power coupled with an interest" on the part of an attorney in the subject-matter in litigation, which will preclude the client from discharging his attorney without cause, the California court quoted with approval from the opinion of the late Chief Justice Marshall in the case of Hunt v. Rousmanier's Adm'rs, 8 Wheat. 174, 21 U.S. 174, 204, 5 L.Ed. 589, as follows:

"The power must be engrafted on an estate in the thing. The words themselves would seem to import this meaning. 'A power coupled with an interest,' is a power

which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest,' an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases, when the interest commences, and therefore, cannot, in accurate law language, be said to be 'coupled' with it."

In the O'Connell Case the California court further said: "This definition has been generally recognized and accepted and has received the unqualified approval of this court. McColgan v. Bank of California Ass'n, 208 Cal. 329, 335, 281 P. 381, 65 A.L.R. 1075; Kunz v. Anglo & L. P. Nat. Bank, 214 Cal. 341, 344, 5 P.2d 417; Capital Nat. Bank v. Stoll, 220 Cal. 260, 264, 30 P.2d 411.

"The decisions agree that for a power to be coupled with an interest, so as to be irrevocable, there must be a specific, present, and co-existing interest in the subject of the power or agency. * * *

"It is plain from the foregoing authorities that the interest which the attorney in fact must have in the subject of the power in order to render the power irrevocable is such a beneficial interest in the thing itself, apart from the proceeds, that if the power were revoked he would be deprived of a substantial right. In other words, the relation of the attorney in fact to the subject-matter must be such that a revocation of the power would be inequitable. Such is not the case here. The interest in the proceeds of what may be collected is not, strictly speaking, a beneficial interest in the legacies. The interest is nothing more than an assurance that the attorney in fact will be reimbursed and compensated out of the legacies when collected."

The preceding language is peculiarly applicable to the facts of this case. The contract for contingent fees which was executed with Mr. Eversole, and the purported assignment of one-third interest in whatever judgment might be recovered in that litigation, gave him no actual interest in the subject of litigation apart from his authority to prosecute the case of his client, with the assurance that his contingent fee would be paid if he rendered the service and collected a judgment for damages for the injuries sustained in the auto-

mobile casualty. His employment or power to act as an attorney in that litigation is not thereby coupled with such an interest as will preclude his discharge.

In accordance with the preceding rule of law, under circumstances almost exactly like the facts of this case, the Supreme Court of Washington, in the case of *Hamlin v. Case & Case*, supra, held that a client had the right to discharge her attorney, in spite of the existence of a written contract to pay him one-third of whatever sum he succeeded in collecting from a debtor by suit or compromise. In the contract which was involved in that case it was specified that the appointment of the attorney was irrevocable, and that the employment was "coupled with an interest in the subject-matter." By the terms of that agreement an undivided one-third interest in the judgment to be procured was assigned to the attorney. That case quotes with approval from the California cases regarding the announced doctrine of the interest of an attorney in the subject-matter by virtue of a mere contract for contingent fees.

[5] When an attorney is discharged without fulfilling the services which he contracts to perform for a contingent fee, he may recover as damages under proper circumstances the reasonable value of the services which he actually renders. Under such circumstances he is not necessarily entitled to recover the entire contingent fee. Ordinarily the measure of his damages is not the amount of contingent fees stipulated in the contract, but it is the reasonable value of the services performed. Section 284, Code Civ.Proc. The *Hamlin Case*, supra, says in that regard:

"The rule is general here, and elsewhere, that where the compensation of an attorney is to be paid to him contingently on the successful prosecution of a suit and he is discharged or prevented from performing the service, the measure of damages is not the contingent fee agreed upon, but reasonable compensation for the services rendered, and 'If the compensation agreed upon is contingent on the successful result of the suit, the measure of damages is not the contingent fee, but the reasonable value of the services rendered.'"

[6] The purported assignment to Eversole of one-third of the judgment as a contingent fee for services does not have the effect of creating an employment "coupled with an interest" so as to preclude the discharge of the attorney. In *re Estate*

of *Cazaurang*, 1 Cal.2d 712, 36 P.2d 1069; *Kunz v. Anglo & London Paris Nat. Bank*, 214 Cal. 341, 5 P.2d 417; *Hamlin v. Case & Case*, supra.

Section 284 of the Code of Civil Procedure was amended and became effective September 15, 1935, St.1935, p. 1647, to authorize the court upon application of either a client or his attorney to discharge an attorney pending litigation, for which it is agreed he shall receive a contingent fee to "determine the amount and terms of payment of the fee." That section now reads in part:

"The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows: * * *

"2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other except that in all civil cases in which the fee or compensation of the attorney is contingent upon the recovery of money, in which case the court shall determine the amount and terms of payment of the fee or compensation to be paid by the party."

[7,8] Without the preceding amendment, when an attorney is properly discharged, his fees may be fixed by the court in a proceeding therefor, independently of a contract for contingent fees, based upon reasonable compensation for services actually performed. But we are of the opinion the preceding amendment is applicable to this case for the reason that under the terms of the contract Eversole had no right of action under any circumstance to recover his contingent fee until judgment in the damage suit was first rendered. His claim under the contract did not accrue until December 10, 1935, when that judgment was entered. The amendment was in effect before that date. The question as to whether the amendment may be deemed to take effect retroactively is not involved in this suit.

[9,10] In the present case the attorney was discharged for adequate cause. The court so determined. The evidence shows that, in preparation for the trial and in the taking of a deposition of Anna Kinsler, the attorney was facetious and insulting toward his client so that she lost confidence in him and his ability to properly represent her interests in the litigation with which he was intrusted. He refused to inform her regarding the probable questions she would be asked in taking her deposition. He in-

structed her in securing her evidence for the trial to "go out and dig up all the dirt * * * about Lou Anker and bring it in here, we will produce it in court, the judge may not allow it, but it will have its effect upon the jury." In the taking of Mrs. Kinsler's deposition, when she was asked by adverse counsel if she was married, her attorney replied, "Oh, that's going to be my next case for Mrs. Kinsler, her divorce." As a matter of fact she was living in perfect harmony with her husband and no divorce proceeding was ever contemplated. This conduct greatly embarrassed and humiliated her. Finally, he demanded that his client should pay him \$200 to secure a jury, in spite of the fact that she told him her farm was mortgaged and she was unable to advance the necessary jury fees, and wanted to try the case without a jury. The attorney then told her that he would not proceed with the case unless she raised the money for a jury trial. This conduct was sufficient to support the findings of the court to the effect that the client was justified in her loss of confidence in her attorney's ability or inclination to properly represent her in the suit, and that she was warranted in discharging him as her attorney. The findings in that regard were unnecessary under the circumstances of this case, but they are adequately supported by the evidence.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



24 Cal.App.2d 362

BROWN v. PATELLA et al.
Civ. 11627.

District Court of Appeal, Second District,
Division 2, California.

Jan. 13, 1938.

Rehearing Denied Feb. 2, 1938.

Hearing Denied by Supreme Court
March 14, 1938.

1. Bills and notes ☞508

In action on note, a written ratification of bank's oral assignment of note to plaintiff, made by bank under corporate seal, was erroneously excluded from evidence.

2. Bills and notes ☞214

An oral assignment of a promissory note is valid

3. Bills and notes ☞214

In action on note assigned to plaintiff, it was not necessary that plaintiff prove any consideration passing from him to his assignor for assignment, especially where evidence showed that assignment was made for collection.

4. Banks and banking ☞104, 118

In action on note orally assigned to plaintiff by bank for collection, it was not necessary that authority of officer of bank to make oral assignment be proved, nor that execution should have been authorized by resolution of board of directors previously adopted.

5. Bills and notes ☞452(2)

An action on note cannot be defended on ground that title is not in plaintiff, in absence of bad faith, where plaintiff has possession and defendant would be protected by payment of any judgment on note.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by A. G. Brown against Vincent Patella and others for a deficiency on a promissory note after sale of real property under a trust deed. Judgment for defendants, and plaintiff appeals.

Reversed.

Edmund Nelson, Howard Waterman, and G. L. Berry, all of Los Angeles, for appellant.

Kellogg & Matlin and John F. Dolan, all of Los Angeles, for respondents.

CRAIL, Presiding Justice.

This is an appeal from a judgment for defendants in an action brought for a deficiency on a promissory note after sale of certain real property under a trust deed. The allegation of the complaint was that the note was assigned and transferred to the plaintiff who, was the owner thereof.

Plaintiff's evidence as to the assignment was testimony of plaintiff's attorney as follows: "I am an attorney at law, employed by Bank of America National Trust and Savings Association, in its Legal Department, with the title of 'Assistant Attorney.' * * * On December 26, 1934, Mr. J. S. Henton, a Vice-President of the bank handed me the note which is marked 'Exhibit A' and told me to endorse on it an assignment to A. G. Brown and to have it exe-

cuted by a Vice President and Assistant Secretary of the corporation, with the seal of the corporation, and to bring an action for a deficiency in the name of A. G. Brown. I brought the action for deficiency in the name of A. G. Brown, but neglected to follow instructions with respect to the endorsement by the officers to A. G. Brown and did not discover the omission until the matter came up for trial on February 10, 1937. At the time the note was handed to me it was handed to me with the statement that it was assigned to A. G. Brown. After the note was handed to me by Mr. Henton I gave it to my stenographer with a memorandum of facts concerning the deficiency and asked her to prepare a complaint. There was no consideration. The note was handed to Mr. Brown solely for the purpose of this suit."

[1, 2] The plaintiff had the note in court at the trial, and it was admitted in evidence. The plaintiff also offered in evidence a written ratification of the oral assignment made by the bank under the corporate seal; but this offer of evidence was erroneously rejected by the trial court. The finding of the court was, "that it is not true that the note referred to in the plaintiff's complaint was transferred and assigned to the plaintiff prior to the commencement of this action." All of the evidence is to the effect that the note was transferred and assigned to the plaintiff prior to the commencement of the action, and there is no evidence to the contrary. The finding of the court can be upheld only on the theory that an oral transfer or assignment of a promissory note is invalid. Such is not the law. An oral assignment of a promissory note is valid. *Copp v. Mulcahy*, 84 Cal.App. 387, 400, 258 P. 141; *Oswald v. Schwartz*, 181 Cal. 620, 624, 185 P. 959; *Puterbaugh v. McCray*, 25 Cal.App. 469, 144 P. 149. In *Swing v. Lingo*, 129 Cal.App. 518, at page 523, 19 P.2d 56, 58, the court said: "No difficulty is encountered in indulging in the assumption that the court drew the suggested inference because the assignment from respondent to Lingo was verbal. Section 1052 of the Civil Code specifically provides that a transfer may be made without writing in every case in which a writing is not expressly required by statute. It is therefore the general rule that, in the absence of a statute requiring that an assignment be in writing, it is immaterial whether it is made orally or by writing. [Citing cases.]"

[3] The defendant places much importance upon the fact that there was no consideration passing from the plaintiff to the bank. It was not necessary that plaintiff prove any consideration passing from him to the bank for the assignment, especially where the evidence shows that the assignment was made for collection. *Anderson v. Wickliffe*, 178 Cal. 120, 122, 172 P. 381; *Johnston v. Wolf*, 118 Cal.App. 388, 391, 5 P.2d 673.

[4, 5] Neither was it necessary that the authority of the officer of the bank to make the oral assignment be proved. *Dyer v. Sebrell*, 135 Cal. 597, 67 P. 1036. Nor was it necessary to its legality that its execution should have been authorized by resolution of the board of directors previously adopted. *Leitch v. Marx*, 21 Cal.App. 208, 212, 131 P. 328.

There is no contention that the plaintiff is acting in bad faith. In *Smith v. Woods*, 164 Cal. 291, at page 293, 128 P. 748, 749, the court said: "In the absence of bad faith, an action upon a note cannot be defended upon the ground that the title is not in the plaintiff, if plaintiff has possession; and defendant would be protected by the payment of any judgment on the note. [Citing cases.]"

Judgment reversed.

We concur: WOOD, J.; McCOMB, J.



24 Cal.App.2d 370

BRUCE et al. v. TURNSTALL.

Civ. 1898.

District Court of Appeal, Fourth District,
California.

Jan. 13, 1938.

Appeal and error — 627(2)

An appeal was required to be dismissed for failure of appellant to file a transcript within required time, where notice of appeal was filed on July 10th, proceedings for settlement of a bill of exceptions or for preparation of a recorded transcript were not pending at time of motion for dismissal of appeal, and proceedings therefor had been terminated by trial court on October 22d.

Appeal from Superior Court, Orange County.

Action by E. S. Bruce and others, co-partners, and another, against H. P. Turnstall. From a judgment for the plaintiffs, the defendant appeals. On motion of the plaintiffs to dismiss the appeal.

Motion granted and appeal dismissed.

Joe E. Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for appellant.

Ray H. Overacker, of Huntington Beach, and Tripp, Penney & Callaway, of Los Angeles, for respondents.

JENNINGS, Justice.

The certificate of the county clerk of the county wherein this action was tried has been submitted in support of this motion by respondents to dismiss the appeal herein for failure of appellant to file a transcript on appeal within the required time. From the aforementioned certificate it appears that notice of appeal from a judgment rendered in favor of respondents was filed on July 10, 1937, that no proceedings for settlement of a bill of exceptions or for the preparation of a reporter's transcript are now pending in the trial court, the proceedings therefor initiated by appellant H. P. Turnstall having been terminated by order of the trial court on October 22, 1937. Under these circumstances, the motion is proper and must be granted. Christensen v. Couey, 136 Cal.App. 268, 28 P.2d 689.

The appeal is dismissed.

We concur: BARNARD, P. J.; MARKS, J.



24 Cal.App.2d 371

ATLAS ASSUR. CO., Limited, v. TUNSTALL.

Civ. 1899.

District Court of Appeal, Fourth District, California.

Jan. 13, 1938.

Appeal and error 627(2)

An appeal was required to be dismissed for failure of an appellant to file transcript

75 P.2d—81½

within time prescribed, where notice of appeal was filed on July 10th, proceedings for preparation of the transcript were not completed and were terminated by trial court on October 22d, and no proceedings for preparation of transcript or for settlement of a bill of exceptions were pending in trial court at time of motion for dismissal of appeal.

Appeal from Superior Court, Orange County.

Action by the Atlas Assurance Company, Limited, against H. P. Tunstall. From the judgment, the defendant appeals. On motion of the plaintiff to dismiss the appeal.

Motion granted and appeal dismissed.

Joe E. Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for appellant.

Hindman & Davis, of Los Angeles, for respondent.

JENNINGS, Justice.

This motion by respondent to dismiss the appeal for failure of appellant to have filed a transcript on appeal within the time prescribed by law is supported by the certificate of the county clerk of the county wherein the action was tried. From this certificate it appears that notice of appeal was filed on July 10, 1937, that on the same date appellant requested the clerk to prepare a transcript to be used on the appeal, that the proceedings thus initiated by appellant for the purpose of having such transcript prepared were not completed and were dismissed and terminated by the trial court on October 22, 1937, and that no proceedings for the preparation of such transcript or for the settlement of a bill of exceptions are now pending in the trial court. The motion for dismissal is therefore proper and must be granted. Di Giacomo v. Southern Pacific Co., 1 Cal.App. 2d 377, 36 P.2d 427.

The appeal is dismissed.

We concur: BARNARD, P. J.; MARKS, J.

10 Cal.2d 399

In re RATH'S ESTATE.**FAY et al. v. RILEY, State Controller et al.****L. A. 15879.**

Supreme Court of California.

Dec. 21, 1937.

As Modified Jan. 19, 1938.

1. Wills ⇨475

Will executed with formalities required for testamentary instruments and agreement, in accordance with which will was executed, not complying with requirements for testamentary documents, and not incorporated by reference in will, could not be construed together as one document, and the agreement could not be imported into or become part of will as such.

2. Wills ⇨67

Where wife agreed to devise her separate realty to her husband, who agreed to devise such realty or unconsumed portion thereof to wife's nephews, and wife devised property to husband in fee simple absolute, husband's fee-simple estate was subject to charge of the valid contract which was enforceable in equity.

3. Wills ⇨63

Where wife agreed to devise her separate realty to her husband, who agreed to devise such realty or unconsumed portion thereof to wife's nephews, and wife devised property to husband in fee simple absolute, by virtue of the contract in so far as the equitable estate was concerned, husband had life estate with power to consume, and the nephews had the interest in remainder.

4. Taxation ⇨886½

The inheritance tax is to be measured by beneficial succession. St.1921, p. 1500, as amended.

5. Taxation ⇨856

The tax provided for by the inheritance tax act is a "succession tax" and is a tax on the privilege of succeeding to property. St.1921, p. 1500, as amended.

[Ed. Note.—For other definitions of "Succession Tax," see Words & Phrases.]

6. Taxation ⇨893

In fixing inheritance tax, court may consider agreements extrinsic to will which lim-

it absolute estate devised by will. St.1921, p. 1500, as amended.

7. Taxation ⇨895(9)

The order fixing inheritance taxes which may incidentally determine question in regard to succession and beneficial ownership is not binding, except for tax purposes, as between those who claim the estate whether as heirs, legatees, or beneficiaries of a trust extrinsic to the will. St.1921, p. 1500, as amended.

8. Taxation ⇨860

Inheritance tax statute should be given reasonable construction, and not one which would make its application impractical, unfair, or unreasonable. St.1921, p. 1500, as amended.

9. Taxation ⇨892

Where wife agreed to devise her separate realty to her husband, who agreed to devise such realty or unconsumed portion thereof to wife's nephews, and wife devised property to husband in fee simple absolute, the tax due upon the interest of the nephews was a matter for consideration in the probate of the wife's estate. St.1921, p. 1500, as amended.

10. Taxation ⇨893

An order fixing inheritance taxes has the incidents of a "final judgment." St.1929, p. 1848, § 16; St.1921, p. 1520, § 18.

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

11. Taxation ⇨892

Where wife agreed to devise her separate realty to her husband, who agreed to devise such realty, or unconsumed portion thereof, to wife's nephews, and wife devised property to husband in fee simple absolute, even if order made in wife's estate proceeding would bar collection of inheritance tax from the wife's nephews on the estate derived by the nephews through the wife's will, the bar was waived where the nephews did not seek to escape taxation altogether but sought to have tax based on their relations to the wife and at rates in effect at her death, and court could require payment of the tax in the husband's estate proceeding prior to distribution to nephews based on nephews' relation to wife and at rates prevailing at her death, since tax unless barred by order in wife's estate proceeding remained lien until paid. St.1921, p. 1503, § 3; St.1929, p. 1842, § 8, subd. 1.

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Proceeding in the matter of the estate of William A. Rath, deceased, wherein an order was made which included a determination as to the inheritance tax payable by Kenyon Tudor Fay and another, executors, to Ray L. Riley, Controller of the State of California, and others. From that portion of the order determining the matter of inheritance tax, the executors appeal.

Order reversed in part.

Prior opinion, 67 P.2d 1073.

Henry O. Wackerbarth, of Los Angeles, for appellants.

W. H. H. Gentry, Inheritance Tax Atty., of Sacramento, and Clyde C. Triplett, Asst. Inheritance Tax Atty., of Los Angeles, for respondent Ray L. Riley, state controller.

SEAWELL, Justice.

This appeal is from an order fixing the amount of inheritance taxes to be paid upon devises made by the will of William A. Rath, deceased, to appellants, Kenyon Tudor Fay and Sheldon Paige Fay. Appellants are the nephews of Nellie Fay Rath, predeceased wife of the decedent.

On June 27, 1934, Mr. and Mrs. Rath entered into a written agreement whereby Mrs. Rath agreed to will four parcels of real property owned by her as her separate property to her husband in the event he survived her. Mr. Rath, in turn, agreed that he would make a will devising said property "or such portion thereof as has not been used or consumed by him during his natural life for his support and livelihood, in whatsoever form the same may then be in," to his wife's two nephews. In the event of the death of either nephew before Mr. Rath, he was to devise the share of such nephew to his issue, or in default of issue to the surviving nephew, or his issue.

Mrs. Rath died on February 8, 1935, leaving a will wherein she devised all property owned by her to her husband in fee simple absolute. He died five months later, on July 8, 1935. By his will he devised to his wife's two nephews the real property which was the subject of the agreement of June 27, 1934. Thus Mr. Rath fully performed his agreement with his wife.

In the five months intervening between his wife's death and his own death, Mr. Rath used no part of his wife's estate for

his support. By decree of final distribution in the wife's estate, filed on November 27, 1935, all property was distributed to the heirs or devisees of William A. Rath, subject to the administration of his estate. The husband's estate, of which appellants are executors, is now in course of administration, and the appeal herein is taken from the order fixing the inheritance tax upon the devises contained in his will in favor of appellants, his wife's nephews.

Appellants contend that the will of Nellie Fay Rath and the contemporaneous agreement of June 27, 1934, should be read "as one document," with the result that under said will the husband received a life estate, with power to use and consume the principal for his support, and with remainder to the wife's two nephews of the portion unconsumed at his death. This species of life estate has been recognized when created by the terms of the will of a testator. Cases cited, *infra*. In this interpretation the two nephews would take as remaindermen under the wife's will, and would be allowed a greater exemption from taxation as relations of the wife than if, as held by the court below, their succession is referred to the husband, to whom their status, under the Inheritance Tax Act, St.1921, p. 1500, as amended, is that of strangers. They would further profit from the construction for which they contend in that the rates of taxation prevailing when Mrs. Rath died were lower than those in effect on the death of Mr. Rath. The difference involved is \$812.94.

If appellants' contention is correct, then an inheritance tax should have been charged against their interests in the probate of the estate of Nellie Fay Rath, and no tax would then have become due from them in the estate of Mr. Rath. In the estate of Nellie Fay Rath the court fixed the inheritance tax as upon a transfer in fee simple absolute to Mr. Rath. The net value of the estate for inheritance tax purposes was \$12,875.74. After allowing Mr. Rath the exemption of \$10,000 permitted to a husband by the Inheritance Tax Act in force at the date of Mrs. Rath's death (section 6, Inheritance Tax Act of 1921, St.1921, pp. 1500, 1506, as amended by St.1929, p. 1840), the tax amounted to \$28.75 at the rate of one per cent. on the balance of \$2,875.74. No tax was assessed against appellants herein in the estate of Mrs. Rath. They had informed the inheritance tax appraiser in said estate of the agreement. Appellants now

state in their briefs that they are not seeking to escape taxation through this appeal in the estate of Mr. Rath, but they are willing to pay a tax based on their relationship to Mrs. Rath and at the rates prevailing at the time of her death.

[1] We are of the view that appellants are entitled to prevail, but not precisely on the theory advanced by them. The will of Mrs. Rath, executed with the formalities required for testamentary instruments, and the agreement not shown to have been thus executed, cannot be construed together "as one document." The provisions of an instrument not complying with the requirements for testamentary documents, and not incorporated by reference in the testator's will, cannot be imported into or become a part of the will, as such. The court in the estate of Mrs. Rath properly ordered distribution in accordance with her will, which disposed of her property in fee to Mr. Rath. *In re Estate of Everts*, 163 Cal. 449, 454, 125 P. 1058; *Curdy v. Berton*, 79 Cal. 420, 21 P. 858, 5 L.R.A. 189, 12 Am.St.Rep. 157; *In re Sharp's Estate*, 17 Cal.App. 634, 120 P. 1079; 26 Cal.Jur. 975.

Had Mrs. Rath devised the property to her husband, with a provision in her will that the portion unconsumed for his support should pass to her nephews, the husband's estate under the will would have been a life estate, with power to use and consume principal, and with remainder over to her nephews. This species of life estate has been recognized in a number of decisions in this state. *Colburn v. Burlingame*, 190 Cal. 697, 214 P. 226, 27 A.L.R. 1374; *Hardy v. Mayhew*, 158 Cal. 95, 110 P. 113, 139 Am.St.Rep. 73; *Luscomb v. Fintzelberg*, 162 Cal. 433, 123 P. 247; *Adams v. Prather*, 176 Cal. 33, 167 P. 534; *In re Estate of Tooley*, 170 Cal. 164, 149 P. 574, Ann.Cas.1917B, 516; see, also, *Chesnut v. Chesnut*, 300 Pa. 146, 151 A. 339, 75 A.L.R. 66; *In re Wettengel's Estate*, 278 Pa. 571, 123 A. 488; *Allen v. Hirlinger*, 219 Pa. 56, 67 A. 907, 13 L.R.A. N.S. 458, 123 Am.St.Rep. 617.

[2] In the case herein, the estate devised to the husband by the will of his wife was an absolute estate in fee simple. But said estate was subject to the charge of the valid contract, enforceable in equity, that the husband should use and consume the estate only for "his livelihood and support," and that the unused portion should be devised by him to his wife's nephews.

Had he either died intestate or devised the property to other persons, such persons would have held the property as constructive trustees for said nephews, and could have been compelled in an equitable action to turn over the property to the nephews. *In re Estate of Rolls*, 193 Cal. 594, 226 P. 608; *McCabe v. Healy*, 138 Cal. 81, 70 P. 1008; *Owens v. McNally*, 113 Cal. 444, 45 P. 710, 33 L.R.A. 369; 25 Cal.Jur. 152; 26 Cal.Jur. 834.

[3] By virtue of the contract the husband's beneficial interest was limited to his life. He was a trustee for his wife's nephews, for whose benefit the contract expressly was made. In so far as the equitable estate is concerned, rather than the bare legal title, he had a life estate with power to consume, and the nephews had the interest in remainder.

This brings us to the core of the problem in the instant case. Must the probate court in fixing inheritance taxes consider only the legal interest passing under a will or by intestate succession, or may it also take cognizance of trusts depending on valid extrinsic agreements to determine the persons entitled to the beneficial enjoyment of the property?

A testator may devise his property absolutely to one who bears him no relationship, subject to a valid trust depending on an extrinsic agreement under which a near relative, perhaps a wife or child, has the sole beneficial enjoyment of the property. In such a case must the court in assessing the tax look only to the will? In view of the fact that a stranger to the blood succeeds to an absolute estate under the will, must the court apply the rates applicable to strangers?

Conversely, the testator may make an absolute bequest to a near relative, who by virtue of an extrinsic agreement may hold subject to a valid trust for the sole benefit of a stranger to the blood of the testator. The transaction may have taken this form without an intent to escape taxation, but if in fixing the tax the court may look only to the will, the bequest of which the stranger has the beneficial use will escape taxation in whole or in part.

[4,5] The Inheritance Tax Act contains no express provision with regard to taxation where trusts or charges extrinsic to the will exist. However, considering the act as a whole, we are of the view that the intent is that the tax shall be measured

by beneficial succession. The tax provided for is a succession tax. It is a tax on the privilege of succeeding to property. In re Estate of Miller, 184 Cal. 674, 195 P. 413, 16 A.L.R. 694; In re Estate of Watkinson, 191 Cal. 591, 217 P. 1073; 24 Cal. Jur. 425. The amount of the tax is proportionate to the benefit received. The rate of taxation, as well as the amount of exemption, depends on relationship to the decedent. Transfers "in possession or enjoyment, present or future," are taxable. Section 1, subd. 3, Inheritance Tax Act, as amended by St.1925, p. 472. The rates of taxation under section 4, as amended by St.1929, p. 1838, are dependent on relationship to the decedent of any person "entitled to any beneficial interest."

[6,7] The Inheritance Tax Act reaches transfers by instruments which are non-testamentary, as well as those which arise by will, or by intestate succession. Section 2, subd. 3, as amended by St.1929, p. 1835. Distribution may be ordered only in accord with the instrument which is testamentary. But for purposes of fixing the inheritance tax beneficial succession is the measure. For such purpose we are of the view that the court may consider agreements extrinsic to the will which limit the absolute estate devised by will. Section 15 expressly recognizes that in fixing the inheritance tax the probate court may consider matters not before it in the distribution of an estate. Where the decedent has made transfers inter vivos in contemplation of death, the probate court determines the tax on such transfers of property which constitutes no part of the estate for probate, as well as the tax due on transfers by the will of the decedent. The order fixing inheritance taxes, which may incidentally determine questions in regard to succession and beneficial ownership, is not binding except for tax purposes as between those who claim the estate, whether as heirs, legatees, or beneficiaries of a trust extrinsic to the will. In re Lloyd's Estate, 106 Cal.App. 507, 289 P. 892.

[8] "Revenue or taxation acts are not to be approached with a spirit of hostility and with a purpose of ignoring the intention of the Legislature. * * * The interpretation of tax statutes must in all cases be reasonable. Riley v. Havens, 193 Cal. 432, 225 P. 275. No construction should be given a statute which would make its application impracticable, unfair, or

unreasonable." In re Estate of Parrott, 199 Cal. 107, 248 P. 248, 250.

Research has revealed only a few decisions bearing on the question herein involved. The appellate court in Re Holt's Estate, 61 Cal.App. 464, 215 P. 124, said by way of dictum that it found "persuasive" argument in the authorities which look beyond the will to ascertain the ultimate vestiture of beneficial interest.

In People v. Tombaugh, 303 Ill. 591, 136 N.E. 453, the purchaser of real property caused title thereto to be taken in the name of his wife upon her agreement at her death to will the property to his seven children, six of whom were children of a prior marriage, and hence strangers to the blood of the wife. She performed her promise. The court held that although the deed was absolute, by virtue of the oral agreement the wife held the property in trust for the children, whose beneficial interests passed to them from their father, and were exempt from an inheritance tax, being below the statutory exemption allowed children.

In People v. Schaefer, 266 Ill. 334, 107 N.E. 617, the court considered a case where a devise absolute by will was subject to an extrinsic agreement to use the entire bequest for valid charitable purposes, which would have been exempt if provided for by will. Anthony Wagner devised his property to his brother, James Wagner, subject to the extrinsic trust for charitable purposes. The brother died sixteen days after Anthony Wagner, himself leaving a will wherein he devised the property received from his brother Anthony to Peter P. Schaefer, subject to an extrinsic agreement with Schaefer to carry out the benevolent purposes of Anthony Wagner. The court considered the existence of the valid charitable trust and rule that no tax was due in either estate.

The decisions in Re Romney's Estate, 60 Utah 173, 207 P. 139, 143, and Winn v. Schenck, Ky., 110 S.W. 827, are to the same effect. Where the first taker appears by deed or will of the donor to have an absolute title, but said title is subject to a trust resting on an extrinsic agreement, the succession of those for whom the first taker holds is referred to the donor, rather than to the first taker.

The only decisions which have come to our attention in which the court in assessing the tax has refused to look beyond the will are in New York. In re Edson, 38

App.Div. 19, 56 N.Y.S. 409, affirmed by memo. opinion 159 N.Y. 568, 54 N.E. 1092; *In re Kane's Estate*, 218 App.Div. 278, 218 N.Y.S. 131; *Trustees of Amherst College v. Ritch*, 151 N.Y. 282, 45 N.E. 876, 894, 37 L.R.A. 305, dictum; these cases are contra to earlier decisions in *Re Murphy's Estate*, 4 Misc. 230, 25 N.Y.S. 107, and *In re Farley's Estate*, 15 N.Y.St.Rep. 727.

Decisions such as *In re Grogan's Estate*, 63 Cal.App. 536, 219 P. 87, *In re Gould's Estate*, 156 N.Y. 423, 51 N.E. 287, and *In re Kidd's Estate*, 188 N.Y. 274, 80 N.E. 924, do not consider the problem determined herein. Said decisions are to the effect that a transfer made by will is taxable although in pursuance of a contract, in payment of a debt, or for services rendered. Said decisions had reference to a situation where the testator is disposing of his own property, not of property held by him in trust for others, as to which his will is a mere conduit of title.

[9] In the instant case, having regard for the agreement of June 27, 1934, Mr. Rath took only a life estate for inheritance tax purposes. The tax due upon the interests of the nephews was a matter for consideration in the estate of Mrs. Rath. The order fixing the inheritance tax in her estate has not been included in the record herein. However, it is conceded by the parties that in said proceeding no tax was charged upon the interests which the nephews of Mrs. Rath, appellants herein, had by virtue of the agreement of June 27, 1934.

[10, 11] An order fixing inheritance taxes has the incidents of a final judgment. Section 16, Inheritance Tax Act, St. 1921, p. 1515, as amended by St. 1929, p. 1848, and section 18, p. 1520; *Estate of Brown*, 196 Cal. 114, 236 P. 144; *Kelshaw v. Superior Court*, 137 Cal.App. 189, 30 P.2d 432; *Estate of Edwards*, 138 Cal.App. 162, 32 P.2d 179. Conceding for purposes of discussion that the order as to inheritance taxes made in the estate of Mrs. Rath would, in the circumstances appearing, bar collection of an inheritance tax from appellants on the estate derived by them through the will of Mrs. Rath and the agreement of June 27, 1934, considered together, we are of the view that appellants must be deemed to have waived any bar created by said order. Ap-

pellants have reiterated in their briefs that they are not seeking to escape taxation altogether upon their interests, but that they stand ready to pay a tax based on their relationship to Mrs. Rath and at the rates in effect at her death. In the absence of any bar which may have been created by the inheritance tax order in the estate of Mrs. Rath, the tax which should have been assessed therein against the interests of appellants would remain a lien upon the property until paid. Section 3, St. 1921, p. 1503, and section 8, subd. 1, Inheritance Tax Act, as amended by St. 1929, p. 1842. Since appellants will now receive the property through the will of Mr. Rath as a conduit of title, and since they must be deemed to have waived any bar to collection of the tax arising from the inheritance tax order in the estate of Mrs. Rath, the court in the estate of Mr. Rath may now require payment of a tax on appellants' interests based on their relationship to Mrs. Rath and at the rate in effect at her death prior to distribution to appellants.

If Mr. Rath had not died the problem of assessing the interests of the nephews would have been difficult, but it would have been the same had Mrs. Rath by her will devised to Mr. Rath a life estate, with power to consume principal for his support, and with remainder over to her nephews. The assessment of contingent interests, or vested interests liable to divest on a contingency, is in its nature a difficult matter. The act contemplates that the assessment shall be made as therein provided for, with provision for postponing the fixing of the tax, upon the filing of a bond, until the maturing of the contingency shall permit exact valuation of the interest, for refunds under some circumstances where subsequent events demonstrate that the tax paid was too large, and for compromise and settlement of taxes on contingent interests. Section 8. In the instant case, there is no difficulty in now assessing the tax, since Mr. Rath died without using any part of the property.

The portion of the order appealed from is reversed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; EDMONDS, J.

10 Cal.2d 473

**WILBUR v. DONOHUE KELLY BANK-
ING CO. et al.**

S.F. 15813.

Supreme Court of California.

Jan. 20, 1938.

1. Appeal and error ⇨110

An order denying a motion for new trial is nonappealable.

2. Appeal and error ⇨436

A trial court is without jurisdiction to dismiss an appeal from a judgment of trial court.

3. Appeal and error ⇨801(1)

The policy of the Supreme Court is to dispose of appeals on their merits whenever possible.

4. Appeal and error ⇨595

Where appellant, appealing from judgment, failed to request record, and trial court granted appellees' motion to dismiss any proceeding to procure record for use on appeal from judgment, and, on appeal from such order, trial court certified a transcript of record which was filed in Supreme Court, transcript was considered in connection with appeal from judgment, notwithstanding that appellees, on motion to dismiss appeal from judgment, offered certificates of clerk and trial judge that transcript had been certified solely in connection with appeal from the order.

5. Appeal and error ⇨790(2)

Where appellant, appealing from adverse judgment, failed to request record, and trial court granted appellees' motion to dismiss any proceeding to procure record for use on appeal from judgment, and, on appeal from such order, trial court certified a transcript of record which was filed in Supreme Court and was considered in connection with appeal from judgment, appeal from the order became moot, and no consideration thereof was required by Supreme Court.

In Bank.

Appeal from Superior Court, Contra Costa County; A. F. Bray, Judge.

Action to quiet title by Edith Wilbur against the Donohue Kelly Banking Company and others. Judgment for defendants and plaintiff, in appealing therefrom, failed

to request record, and defendants moved to dismiss appeal. Defendants were then granted an order in trial court dismissing any proceeding to secure a record, and the plaintiff appeals from such order, whereupon trial judge certified a transcript of the record which was filed in the Supreme Court.

Appeal from order terminating proceedings for record dismissed, and motion to dismiss the appeal from the judgment denied.

W. G. Deal, of San Francisco (W. H. Metson and P. H. McCarthy, Jr., both of San Francisco, of counsel), for appellant.

Luther Elkins, of San Francisco, and Tinning & De Lap, of Martinez, for respondents.

WASTE, Chief Justice.

Respondent moves to dismiss the several appeals here pending.

[1,2] The action is one to quiet title. An unraveling of the confusion now prevalent in the cause discloses that plaintiff filed a timely notice of appeal from a judgment quieting defendants' title and from the order denying her motion for new trial. The order is nonappealable and the purported appeal therefrom will be disposed of accordingly. It appears from the various papers offered in support of the motion to dismiss that appellant neglected and failed to file, seasonably or otherwise, any request for a record to be used on the appeal from the judgment. Nevertheless, and in the absence of the pendency of any proceedings for a record, the respondents, out of an abundance of caution or because of confusion, moved the trial court for an order "dismissing" all proceedings for the preparation of a record to be used on appeal and "dismissing all proceedings in said court on any appeal in the above entitled action." The order granting the requested relief followed substantially the language quoted from the motion requesting the same. Plaintiff duly noticed an appeal from the latter order and seasonably requested that a transcript be made up in support thereof. At this point, it should be stated that the motion and order last mentioned were undoubtedly intended merely to terminate proceedings for a record to be used on the principal appeal (though, as stated, no such proceedings had been instituted) and did not, as appellant incorrectly concludes from the peculiar language quoted therefrom, undertake to work a dismissal of her appeal from

the judgment, a function without the jurisdiction of the trial court.

Shortly after appellant had noticed her appeal from the order terminating proceedings for a record, and after she had requested a transcript to be used on the latter appeal, the clerk and trial judge certified a transcript not only of the proceedings on the motion to terminate but a transcript of the entire trial record; that is to say, there has been certified and filed herein a copy of the judgment roll and of the testimony and proceedings upon the trial of the cause and upon the motion to terminate.

[3, 4] Approximately seven months after the filing herein of this complete transcript, the respondents noticed this motion to dismiss and offered in support thereof certain certificates of the clerk and trial judge in which they averred that they had respectively certified to the clerk's transcript of the judgment roll and to the reporter's transcript of the trial proceedings solely in connection with the second and later appeal from the order terminating proceedings. It is obvious that the clerk's transcript of the judgment roll and the reporter's transcript of the trial proceedings are unnecessary to and may not be employed in connection with the later appeal from the order terminating proceedings for which it is asserted they were certified. The disclosed "intention" in certifying to those transcripts for such later appeal is typical of the confusion that runs all through this cause. Aside from this, and in line with our policy to dispose of appeals on their merits, whenever possible, we are of the view that the certified transcripts now before us should be considered in connection with the principal appeal from the judgment to which they are pertinent.

[5] Our conclusion makes the appeal from the order terminating proceedings moot, and it will be disposed of accordingly. In view of this we find it unnecessary to consider respondents' arguments directed at said appeal.

For the foregoing reasons, the appeals from the orders denying new trial and terminating proceedings for a record are, and each is, dismissed. The motion to dismiss the appeal from the judgment is denied, the time for briefs therein dating from the filing hereof.

We concur: SHENK, J.; HOUSER, J.; SEAWELL, J.; CURTIS, J.; EDMONDS, J.; LANGDON, J.

24 Cal.App.2d 504

MORRISON v. HAVENS.

Civ. 10729.

District Court of Appeal, First District,
Division 2, California.

Jan. 24, 1938.

Hearing Denied by Supreme Court
March 25, 1938.

1. Liens ⇨7

A memorandum addressed "to whom it may concern, and especially my executor," reciting merely that "it is agreed that I shall pay" macadamizing bill and grading bill out of sale of described tract, was at most a mere agreement to pay a debt out of a particular fund, when received, and created no equitable lien upon the realty.

2. Executors and administrators ⇨431(2)

Where deceased had executed informal memorandum, construed as not creating an equitable lien, agreeing to pay specified sums out of proceeds of sale of prescribed tract, no action could be maintained thereon without first presenting claim therefor in probate proceedings. Probate Code, § 716.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by W. H. Morrison against John Weston Havens, Jr., to have it declared that written instrument created an equitable lien upon realty and upon proceeds of sale thereof. From a judgment dismissing the complaint after general demurrer there-to was sustained, plaintiff appeals.

Affirmed.

Cornish & Cornish, of Berkeley, for appellant.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

SPENCE, Justice.

Plaintiff sought declaratory relief. A general demurrer to his complaint was sustained with leave to amend. Upon his failure to amend, judgment of dismissal was entered and, from said judgment, plaintiff appeals.

It appears from the complaint that John Weston Havens, deceased (the father of the defendant), was the owner during his lifetime of block 22 of the Shattuck tract in the city of Berkeley. Defendant derived title to said property through the decree of distribution in his father's estate. It was not alleged that plaintiff, or F. W. Bilger,

plaintiff's assignor, presented any claim in the probate proceedings, and it is conceded on this appeal that no such claim was presented. The complaint was based upon a written instrument alleged to have been executed by John Weston Havens in 1903 in words and figures as follows:

"Berkeley, Cal. Jan. 6th, 1903.

"To whom it may concern, and especially my executor—

"It is agreed that I shall pay out of the sale of Block 22 Shattuck Tract number 5, the macadamizing bill of \$617.41 and grading bill of \$349.72.

"J. W. Havens."

From the prayer of the complaint and the briefs it appears that plaintiff was seeking to have it declared that said instrument created an equitable lien upon said real property and upon the proceeds of any sale of said property which might be made at any time.

[1,2] Appellant contends that his complaint stated a cause of action for such declaratory relief and that the trial court erred in sustaining the general demurrer thereto. We find no merit in this contention. The instrument in question manifests no intention to create a lien upon the real property. It appears to be an informal memorandum executed for the purpose of evidencing the personal obligation of the maker. Said obligation was to be paid by the maker or his executor, to whom a claim might be presented, but payment was deferred until the time of sale of the property. At most, it was a mere agreement to pay a debt out of a particular fund, when received, but such an agreement does not create a lien even upon such fund. *Maier v. Freeman*, 112 Cal. 8, 44 P. 357, 53 Am. St.Rep. 151; 37 Cor.Jur., p. 314, § 15; also p. 318, § 21. Appellant concedes that diligent search had failed to disclose any authority holding that an equitable lien is created under the circumstances before us and we know of none. We conclude that no lien was created and that no action could be maintained upon said claim without first presenting said claim in the probate proceedings. Probate Code, § 716. The complaint therefore failed to state a cause of action and the demurrer thereto was properly sustained.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

24 Cal.App.2d 476

McNEW v. MULCAHY.

Civ. 1878.

District Court of Appeal, Fourth District, California.

Jan. 20, 1938.

1. Appeal and error ⇐1126

The appellate court would not grant motion to affirm judgment on ground that appeal was taken for delay only and presented question so unsubstantial as to need no further arguments, where decision on motion involved study of reporter's transcript. Rules of Supreme Court and District Courts of Appeal, rule 5, § 3.

2. Appeal and error ⇐808

Where respondent's motion to affirm judgment because appeal was taken for delay only was denied, respondent's further motion for order placing cause on the ready for submission list in event motion to affirm was denied would be granted, where motions were submitted pursuant to stipulation of parties, briefs were all filed, and it appeared from nature of points involved that further oral argument was not essential. Rules of Supreme Court and District Courts of Appeal, rule 5, § 3.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by E. W. McNew against W. T. Mulcahy. From an adverse judgment, defendant appeals. On respondent's motion to affirm judgment and motion to transfer the cause to the ready for submission list.

Motion to affirm denied and motion to transfer the cause granted, and cause ordered marked ready for submission.

Hazlett & Plummer and Robert J. Sullivan, all of Los Angeles, for appellant.

Simon & Clafin, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

[1] The respondents moved, after the usual three briefs had all been filed, for an order affirming the judgment as provided for in section 3 of rule V of the rules governing this court. An examination of the opening brief and moving papers discloses that it will be necessary to go into the transcript. Under these circumstances, this court has frequently held that such a mo-

tion should be denied. See *Hall v. Wolford*, Cal.App., 71 P.2d 596, and cases there cited.

[2] The respondent has further moved for an order placing this cause on the ready for submission list in the event the motion to affirm is denied. The motions were submitted pursuant to a stipulation of the parties, the briefs are all filed, and it appears from the nature of the points involved that a further oral argument is not essential.

The motion to affirm is denied and the motion to transfer the cause to the ready for submission list is granted, and the cause ordered marked ready for submission.

I concur: MARKS, J.



24 Cal.App.2d 479

**BROWN v. SUPERIOR COURT IN AND
FOR LOS ANGELES COUNTY et al. ***

Civ. 11675.

District Court of Appeal, Second District,
Division 1, California.

Jan. 21, 1938.

Hearing Denied by Supreme Court
March 21, 1938.

Appeal and error 612(4)

Where parties to appeal stipulated that transcript was "full, true and correct," but oral evidence introduced by appellee, which court had considered in making order appealed from, was not included in transcript, trial judge's certificate to transcript, reciting only that transcript was "true and correct," was proper.

Petition for relief and writ of mandate by Herbert Cutler Brown against the Superior Court of the State of California, in and for Los Angeles County, and the Honorable Leslie E. Still, judge of said court, wherein order to show cause was issued to determine whether or not defendant judge had properly certified to transcript on appeal.

Order to show cause discharged.

Ferman E. Davis and Herbert Cutler Brown, both of Hollywood, for petitioner.

Carpenter, Babson & Fendler and Everett W. Mattoon, Co. Counsel, all of Los Angeles, for respondents.

YORK, Presiding Justice.

It appears from the record herein that Leslie E. Still, Judge of the superior court, made a certificate, certifying:

2 "Judge's Certificate

"I Hereby Certify the foregoing transcript consisting of 146 pages to be true and correct, and the same is hereby settled and allowed this 8th day of October, 1937.

"Leslie E. Still,
"Judge of the Superior Court."

This certificate was attached to a transcript which contained the following stipulation:

"Stipulation

"We Hereby Stipulate the foregoing to be a full, true and correct transcript of the papers, pleadings, records and files presented by defendant and appellant at the hearing of said motion on May 27, 1937, in the above entitled court and cause.

"Ferman E. Davis

"Herbert Cutler Brown

"Attorneys for Defendant and Appellant

"Ingle Carpenter & Harold A. Fendler

"By Harold A. Fendler

"Attorneys for Plaintiff and Respondent."

The plaintiff was one Zoe Lowe Brown and the only defendant, Herbert Cutler Brown, was also the only appellant in the proceeding in which the "transcript" was prepared.

An order to show cause was issued herein to determine whether or not the said defendant judge had, in certifying to said transcript, fully complied with everything that was legally required of him in the premises. The above certificate signed by the trial judge is a more favorable certification for appellant than the stipulation provided for, and it is called to our attention in the response to the order to show cause that there was other evidence presented to the court by Zoe Lowe Brown, the plaintiff in the case, upon the hearing of the motion of petitioner, which evidence is not set out in the "transcript." Said motion was denied by the trial court, and in denying the petitioner's motion the said court not only considered the evidence introduced by the defendant, who is also the appellant, but also considered the oral testimony introduced by the plaintiff in said original case who was resisting the motion of appellant therein, which evidence consisted of documentary evidence and records and files. No

part or portion of the evidence so presented by the said plaintiff and respondent upon the hearings of the "motion for an Order or judgment of respondent court *vatacing* and setting aside the portion of the Judgment of December 9, 1936" (page 5, lines 11 to 15, inclusive, of "Petition for Relief and for Writ of Mandate," quoted without correction) appears in the transcript presented for certification to Judge Still.

The concluding portion of the response to the order to show cause filed herein requests that petitioner's order to show cause herein should be discharged and both his petition and appeal dismissed.

The petitioner's order to show cause herein is discharged, for the reason that the trial judge has made a certificate as favorable to petitioner herein as could be made in the given matter under the facts and circumstances shown, to wit, the fact that there was evidence introduced other than the evidence set forth in the transcript on appeal presented by the petitioner herein. We are not passing upon the sufficiency of the method of appeal, as that is unnecessary by reason of the foregoing decision.

We concur: DORAN, J.; WHITE, J.



24 Cal.App.2d 468

CULLINAN v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY et al.*

Civ. 5974.

District Court of Appeal, Third District,
California.

Jan. 20, 1938.

Rehearing Denied Feb. 16, 1938.

Hearing Denied by Supreme Court
March 21, 1938.

1. Mandamus ☞77(4)

States ☞53

The state personnel board acts quasi-judicially in passing on the application of a discharged civil service employee for reinstatement, and if it has jurisdiction of the parties and subject-matter, its decision is not, under the statute, reviewable by mandamus or otherwise. St.1929, p. 252, § 14.

2. Mandamus ☞3(12)

Mandamus may not serve as a writ of review.

*Hearing denied 77 P.2d 471.

3. States ☞53

The rule that a tribunal having jurisdiction of the parties and subject-matter has the authority and discretion to decide, even erroneously, the questions submitted to it, applies not only to courts, but also to quasi-judicial tribunals such as the state personnel board.

4. States ☞53

The Legislature may deny a right of appeal from the state personnel board's decision discharging or reinstating a civil service employee; the Constitution being silent regarding appeal. St.1929, p. 252, § 14.

5. Appeal and error ☞1

The right of appeal is not inherent to a legal proceeding, but depends on constitutional or legislative approval.

6. Prohibition ☞28

On petition for a writ of prohibition by a discharged civil service employee subsequently reinstated by the state personnel board, the Court of Appeal may not assume that the superior court in a mandamus proceeding will disregard the statute forbidding review of the board's decisions and hear anew the employee's application for reinstatement. St.1929, p. 252, § 14.

7. Mandamus ☞77(4)

The state personnel board's order reinstating a discharged civil service employee, if beyond the board's jurisdiction because of the absence of evidence or lawful proceedings, is void, and the superior court has no authority in a mandamus proceeding to direct the employee's reinstatement. St.1913, p. 1035, as amended.

8. Mandamus ☞172

On petition by a discharged civil service employee for mandamus to compel his reinstatement pursuant to an order of the state personnel board, the superior court may review the proceedings before the board to determine whether it had jurisdiction to reinstate petitioner. St.1913, p. 1035, as amended; St.1929, p. 252, § 14.

9. Mandamus ☞172

A court in a mandamus proceeding may examine a record or even receive evidence to determine whether the inferior tribunal had jurisdiction.

10. Mandamus ☞172

In a mandamus proceeding by a discharged civil service employee subsequently ordered reinstated by the state personnel board, to compel his reinstatement and the

payment of back salary, the questions whether there is any money in the state treasury for payment thereof, and whether the employee was laid off within the statute governing the recovery of back salary, are issues which must be determined by the superior court, where they were not previously presented to the board. St.1913, p. 1035, as amended; St.1933, p. 712, § 14a; Pol.Code, § 433, subd. 17.

11. States ☞137

The state controller cannot draw a warrant for salaries on an exhausted fund. Pol.Code, § 433, subd. 17.

12. Prohibition ☞11

Mere errors or irregularity of procedure may not be corrected by a writ of prohibition.

13. Prohibition ☞28

On petition by a discharged civil service employee for a writ of prohibition, the Court of Appeal may not assume that the superior court will exceed its jurisdiction or erroneously determine the questions presented in a mandamus proceeding by the employee to compel his reinstatement and the payment of back salary, though the trial judge asserts that he will receive evidence therein and review the state personnel board's order of reinstatement. St.1913, p. 1035, as amended.

Petition by William J. Cullinan for a writ of prohibition against the Superior Court in and for Sacramento County and others, to prevent the review of proceedings before the State Personnel Board, which reinstated petitioner in his position as a referee of the Industrial Accident Commission.

Petition denied.

Courtney L. Moore, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., Ralph H. Cowing, Deputy Atty. Gen., and Everett A. Corten and Eldon B. Spofford, Deputy, both of San Francisco, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

This is a petition for a writ of prohibition to restrain the superior court of Sacramento county from reviewing in a mandamus proceeding which is pending in that court the evidence and proceedings presented before the state civil service commission which led to a decision of that board reinstating this

petitioner in his position as a referee of the industrial accident commission of California.

It is alleged in this petition that William J. Cullinan for a period of time long prior to July 15, 1935, was employed under the Civil Service Act of California, St.1913, p. 1035, as amended, as referee of the industrial accident commission at a salary of \$285 per month; that on September 13, 1935, on the pretense that petitioner had violated the rules of the commission by remaining away on a leave of absence beyond the time authorized, the industrial accident commission wrongfully attempted to discharge him from his position contrary to the provisions of the Civil Service Act, but that, upon petition and proceedings therefor duly had on April 16, 1937, before the state personnel board (substituted for the state civil service commission by constitutional amendment which went into effect November, 1935), it reinstated the petitioner to his former position on the industrial accident commission; that the order reinstating the petitioner became final and is not subject to review as provided by section 14 of the California Civil Service Act, St.1913, p. 1044, as amended by St.1929, p. 252; that the petitioner subsequently presented himself to the industrial accident commission to resume his work, but was prevented by the commission from doing so; that no part of his salary of \$285 per month from and after July 15, 1935, has been paid, but is still due and owing; that petitioner thereafter, in July, 1937, filed in the superior court of Sacramento county a petition for a writ of mandamus against all of the defendants in this proceeding, except the superior court and the judge thereof, setting forth the preceding facts with respect to his employment and reinstatement with the industrial accident commission, and its refusal to recognize his reinstatement by order of the state personnel board or to permit him to renew his employment, and praying for a writ of mandamus to compel his reinstatement and the payment of his salary. The petition in this proceeding further alleges that when the mandate proceeding came on for hearing in the superior court of Sacramento county, the trial judge thereof announced that it was his opinion the decision of the state personnel board, reinstating the petitioner "was not final" and that he proposed to "hear the entire petition for reinstatement de novo and to permit the respondents to introduce evidence" thereon.

Thereupon, by consent, the mandamus proceeding was continued for hearing and this petition for a writ of prohibition was then filed in this court. To this petition the respondents have filed both a general demurrer and an answer.

The petitioner asserts that unless the trial court is restrained it will proceed to hear and review, in the mandamus proceedings, the evidence and proceedings before the state personnel board which led to his reinstatement, contrary to the provisions of section 14 of the Civil Service Act.

Section 14 of the California Civil Service Act, St.1913, pp. 1035, 1044, and amendment thereto, St.1929, p. 252; 1 Deering's Gen. Laws of 1931, p. 630, Act 1400, specifically authorizes the commission to discharge a civil service employee or restore him to his position for the causes and in the manner therein specified. It is provided that such decision "shall be final and not subject to review of any other tribunal."

That section provides in part:

"The tenure of every person holding a position under the provisions of this act shall be during good behavior, but any such person may be removed * * * or restored to his position * * * under a procedure in conformity with the provisions of this section which shall be set up by the commission in its rules and regulations."

After specifying the grounds for such action together with the manner of procedure including the hearings thereof, it is further provided: "The decision must be rendered within a reasonable time after the completion of the trial and shall be entered upon the minutes of the commission. * * * *The decisions of the commission shall be final and not subject to review of any other tribunal.*"

[1-3] The preceding language clearly denies the right of review by means of an appeal from the decision of the civil service commission regarding the removal or reinstatement of a civil service employee. In passing upon the petitioner's application for reinstatement, the state personnel board acts in a quasi-judicial capacity. If that board had jurisdiction of the parties and the subject-matter which were involved in the petition for reinstatement of the petitioner, its decision in that regard became final and is not subject to review by means of mandamus or otherwise. In fact, it has been frequently held that the proceeding in mandamus may not serve as a writ of review

under any circumstances. It is an established rule that where a tribunal has jurisdiction of the parties and of the subject-matter it necessarily has the authority and discretion to decide the questions submitted to it even though its determination is erroneous. 4 Cal.Jur. 1036, § 140. This rule applies to quasi-judicial tribunals as well as to courts.

[4, 5] Since the Constitution is silent regarding the right of appeal from an order discharging or reinstating an employee under the Civil Service Act, the Legislature has the absolute power to deny a right of appeal therefrom. The right of appeal is not inherent to a legal proceeding, but is dependent upon either constitutional or legislative approval. 2 Cal.Jur. 111, § 4; *Superior, Wheeler Cake Corp. v. Superior Court*, 203 Cal. 384, 264 P. 488.

[6-9] We may not assume the superior court will disregard the statute above quoted and hear the petition for reinstatement de novo upon the application for a writ of mandamus. In so far as the board possessed a discretion to determine from the facts adduced that the petitioner was entitled to reinstatement, its decision is not reviewable. But if that board was without jurisdiction to make the order for the reason that there was no evidence or lawful proceedings upon which to base it, the order would be void and the superior court would lack authority to direct his reinstatement. Upon the petition for a writ of mandamus the court has a right to review the proceedings before the state personnel board to determine whether it had jurisdiction to reinstate the petitioner. For the purpose of determining whether the inferior tribunal had jurisdiction a court may examine a record or even receive evidence upon a petition for a writ of mandamus. It is said in 16 California Jurisprudence, p. 815, § 31, in that regard: "The question whether a board, * * * is acting without jurisdiction or in excess of jurisdiction cannot be finally settled and determined by the board itself beyond the power of review of such determination by a court."

The preceding declaration is supported by California authorities. The superior court, therefore, has a right to review the proceedings of the board which resulted in reinstating the petitioner for the purpose of ascertaining whether it had jurisdiction to make the order. In 38 Corpus Juris, page 703, § 287, it is said: "But even where mandamus

is considered a proper remedy for the enforcement of the provisions of these [civil service] statutes, the discretion of the officers or board in passing on the qualifications of applicants *is not subject to review or control* by the courts, except in cases where it clearly appears that there has been an abuse of this discretion, or that the officer has acted in bad faith and with intent to evade the law."

[10, 11] Moreover, the mandamus proceeding was not confined to an effort to require the industrial accident commission to recognize that order alone and to reinstate the petitioner. It also seeks to enforce the payment of his salary during the time he was absent from his employment.

The answer in this proceeding alleges that there is no money in the state treasury available from which to pay the back salary claimed by the petitioner. That raises a valid issue upon which we assume the superior court would have to receive evidence to determine whether the writ of mandamus should issue. The state controller is not permitted to draw a warrant for salaries upon an exhausted fund. Section 433, subd. 17, Pol.Code; *Marshall v. Dunn*, 69 Cal. 223, 10 P. 399; 38 C.J. 671, § 217. Moreover, section 14a of the Civil Service Act, St.1913, p. 1035, as added by St.1933, p. 712, specifically provides that when an employee has been laid off for a period of time he may not be compensated for time subsequent to the date of his suspension unless his claim is enforced by an action commenced within ninety days from the date thereof. That section reads in part: "Any action brought against the appointing power or the Civil Service Commission by an employee laid off must be brought and served within one year, but in the event of such action said employee can not be compensated for the time subsequent to the date of lay off unless such action is filed and served within ninety days from the date of lay off."

The question as to whether this petitioner was in fact laid off for a period of time before he was reinstated, or whether he is entitled to salary for the period of time during which he was not actually employed, was not presented to the personnel board or determined by it. That issue was presented for the first time in the mandamus proceeding. Certainly that is an issue which must be determined by the superior court before a writ of mandamus may issue.

[12] This application for a writ of prohibition to require the superior court to issue a writ of mandamus to compel the industrial accident commission to reinstate the petitioner and to require the state controller to draw his warrant for a specific sum in payment of his salary during the entire time he was not employed to some extent, at least, involves mere procedure of the trial court and the question of the competency of certain evidence upon that mandamus proceeding, and not the mere question as to whether the petitioner was properly reinstated by an order of the state personnel board whose exercise of discretion in that regard is not reviewable by the court. Mere errors or irregularity of procedure may not be corrected by means of the writ of prohibition. It is said in 50 Corpus Juris, page 676, § 43: "Prohibition does not lie to correct or restrict errors or irregularities of a tribunal which is acting within its jurisdiction, although proceeding improperly in the exercise of that jurisdiction. The remedy cannot be used to supersede the ordinary functions of an appeal or writ of error, except as it may be permitted by statute. Where the inferior court or tribunal has jurisdiction of the person and the subject matter, prohibition does not lie to prevent an erroneous decision, or to prevent the enforcement of an erroneous judgment. Where the existence of jurisdiction depends on controverted facts which the inferior court or tribunal is competent to determine, prohibition does not lie, even though the lower tribunal may in such case err in its determination of the question."

In the case of *Wreden v. Superior Court*, 55 Cal. 504, it is said: "The mere fact, if such were the fact, that a court is about to act erroneously or irregularly in a matter of which it has jurisdiction, will not warrant the issuance of a writ of prohibition. Such a writ cannot be used to prescribe what a court shall or shall not consider in a matter before it and within its jurisdiction, any more than a writ of mandate can be used to compel a court how or what to decide. To do either would be to interfere with the judicial functions of a court."

To the same effect is the text in 21 California Jurisprudence, p. 600, § 10. This text is supported by the following decisions: *Van Hoosear v. Railroad Commission*, 189 Cal. 228, 235, 207 P. 903. *Felton Water Co. v. Superior Court*, 82 Cal.App. 382, 389, 256 P. 255.

[13] We may not assume from the trial judge's assertion that he would receive evidence in the mandamus proceeding and review the order reinstating the petitioner, that the superior court will exceed its jurisdiction or erroneously determine the questions which are presented therein.

The petition for a writ of prohibition is denied.

We concur: PULLEN, P. J.; PLUMMER, J.



24 Cal.App.2d 526

FITZKEE v. TURNER.

Civ. 10306.

District Court of Appeal, First District,
Division 1, California.

Jan. 25, 1938.

Appeal and error ⇨1010(1), 1011(1)

The trial court's findings of fact would not be disturbed where evidence was either conflicting or fairly subject to different inferences.



Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Dariel Fitzkee against Fred E. Turner to recover money allegedly due under an agreement and for an accounting. From a judgment for the defendant, the plaintiff appeals.

Affirmed.

Jesse A. Mueller and Russell C. Westover, Jr., both of San Francisco, for appellant.

J. B. Zimdars, of San Francisco, and Frank G. Warren, of Stockton, for respondent.

PER CURIAM.

Plaintiff was in the employ of defendant under an agreement whereby he was to receive a sum per week and a share in the profits of a contract for the installation of the stage and stage equipment in the Memorial Opera House in San Francisco. He brought the present action to recover

money alleged to be due and for an accounting. The trial court found against him and entered judgment in favor of the defendant.

The plaintiff has appealed and attacks the findings as to certain items, which he claims are unsupported.

Without setting forth the evidence here it will be sufficient to say that an examination of the voluminous record shows that the testimony and other evidence with respect to these items is either conflicting or fairly subject to different inferences, and where such is the case the conclusion of the trial court will not be disturbed. Clopton v. Clopton, 162 Cal. 27, 121 P. 720; MacDermot v. Hayes, 175 Cal. 95, 170 P. 616.

No reasonable ground for reversal or modification of the judgment appears, and it is accordingly affirmed.



24 Cal.App.2d 448

CANNON v. CHAPMAN et al.

Civ. 1649.

District Court of Appeal, Fourth District,
California.

Jan. 19, 1938.

1. Fraudulent conveyances ⇨137(4)

An immediate and continued change in possession is not required on the sale of a growing crop. Civ.Code § 3440.

2. Appeal and error ⇨842(8)

In proceeding to determine whether grower's attachment creditor or third party claimants loaning money to grower were entitled to proceeds of sale of crop of oranges, construction of order assigning proceeds of sale of growing crop of oranges to third party claimants was a question of fact for trial judge. Code Civ.Proc. §§ 549, 689, as amended by St.1933, pp. 1865, 1887.

3. Assignments ⇨137

Evidence warranted finding that order directing payment of proceeds of sale of growing crop of oranges to third party claimants lending money to grower gave claimants

rights in proceeds of sale of crop superior to grower's creditor who subsequently attached growing crop, on ground that order was an immediate assignment of the growing crop.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action to recover a sum of money by Burt E. Cannon against Glen W. Chapman, wherein the Riverside County Production Association and another filed third party claims. From an adverse judgment, the plaintiff appeals.

Affirmed.

A. D. Mitchell, of Ontario, for appellant.

Kelley & Hews, of Riverside, for respondents.

MARKS, Justice.

This is a proceeding brought under the provisions of sections 549 and 689 of the Code of Civil Procedure, as amended by St.1933, pp. 1865, 1887, to determine the party entitled to the proceeds arising from the sale of a crop of oranges attached by the sheriff of Riverside county while the fruit was growing on the trees. The judgment under attack was entered on September 10, 1935, so the provisions of section 689 of the Code of Civil Procedure as amended in 1933, St.1933, c. 744, p. 1887, are applicable here.

On and prior to January 10, 1935, Glen W. Chapman was owner of an orange grove upon which the crop of oranges here in question was growing. On that date he borrowed \$400 from the third party claimants and executed a written agreement for repayment of the principal, together with interest at 5 per cent. per annum. As collateral security for the loan he executed a writing which recited:

"I hereby assign, transfer and deposit with the payee the following:

"As assignment of Proceeds of Sale of Mortgaged Crops dated January 10th, 1935, and Acceptance of Assignment and Subordination Agreement accepted by the Riverside Citrus Association January 11, 1935."

In another writing bearing the same date it was provided: "That the undersigned (hereinafter referred to as 'Grower') (Chapman) does hereby sell, assign, transfer, set over, and deliver to the Riverside County Production Credit Association of

Riverside, California, (hereinafter referred to as 'Credit Association'), and the Federal Intermediate Credit Bank of Berkeley, California (hereinafter referred to as 'Credit Bank'), the proceeds of sale of that certain crop of oranges produced by the Grower during the calendar year 1935-36, and delivered by the Grower to Riverside Citrus Association, (hereinafter called 'Marketing Organization') or other agencies affiliated with the said Marketing Organization, for marketing purposes, and the Grower does hereby authorize and direct the Marketing Organization to deliver the said proceeds of sale, including all refunds of prepaid freight charges and all other refunds or credits accruing in favor of the Grower as a result of the handling of said crops and/or from previous crops by the Marketing Organization or its affiliated agencies, to the Credit Association at its office in Riverside, California, and to the Credit Bank at its office in Berkeley, California."

This order was accepted in writing by the Riverside Citrus Association on the 11th day of January, 1935.

On February 14, 1935, plaintiff brought this action to recover \$1,650 from defendant. A writ of attachment was issued and the sheriff levied upon the crop of oranges then growing on the trees and also attached the land.

On March 16, 1935, the plaintiff and the defendant entered into a stipulation permitting the sheriff to have the Riverside Citrus Association pick, haul, pack, and market the crop of oranges, the proceeds to be paid to the sheriff and held by him pending the outcome of the litigation. It was particularly agreed that these acts should not affect the rights of the parties which should be determined as they existed at the time of the attachment.

The third party claimants were not parties to this stipulation, but they make no point of this fact. They filed their claim under the note and assignment. No objection is made to the form or sufficiency of the claim.

Plaintiff gave the sheriff a bond to require him to retain possession of the attached property. Section 689, Code Civ.Proc. This bond was insufficient, so the sheriff delivered "said funds involved in the claim," presumably \$400 and accrued interest, to the third party claimants.

Plaintiff filed his petition to have title to the property determined by the court. Findings and judgment went against plaintiff, and this appeal followed.

[1] The question here involved is the priority of the assignment by Chapman to the third party claimants on January 10, 1935, over the lien of the attachment made on February 15, 1935, in the suit by plaintiff. In this connection it should be observed that on a sale of a growing crop there need be no immediate and continued change of possession as required by section 3440 of the Civil Code. *Bours v. Webster*, 6 Cal. 660; *Davis v. McFarlane*, 37 Cal. 634, 99 Am.Dec. 340; *Globe Grain & Milling Co. v. Drenth*, 36 Cal.App. 156, 171 P. 821; *Urick v. Guitron*, 15 Cal.App.2d, 523, 59 P.2d 636.

The factual situation involved in the case of *Curtner v. Lyndon*, 128 Cal. 35, 60 P. 462, 463, is so similar to the situation presented here that the decision in the *Curtner Case* must be considered as controlling.

In that case *Cunningham* was the owner of a ranch which he leased to *Cropley* under a cropping contract which reserved to the owner a certain share of the crops of hay and grain raised on part of the ranch. Judgment creditors levied upon *Cunningham's* interest in these growing crops. Thereafter *Cunningham* gave the following order which was presented to *Cropley*:

"Santa Cruz, Cal., May 26, 1896.

"Mr. Charles Cropley:

"You will please pay Mr. Henry Curtner the rent of the Ynigo ranch farmed by you, and oblige,

"James F. Cunningham."

Curtner paid off all of the liens on the crops. Subsequently another execution was levied on what had been *Cunningham's* interest in the growing crops and this interest, was sold by the sheriff.

In holding that at the time of the levy of the second execution *Curtner*, and not *Cunningham*, was the owner of an interest in the growing crops, the Supreme Court said: "Defendant raises three questions upon this appeal, and we will confine our attention to those points alone. It is first claimed that an order to pay rent cannot pass title to personal property. It is perfectly plain from the language of this order that the word 'rent,' as here used, refers to *Cunningham's* share of the growing crops. It has been often held that an order to the

debtor by the creditor to pay money to a third party operates as an equitable assignment of the debt. *Pope v. Huth*, 14 Cal. 403. Defendants' counsel in oral argument concedes that, if this writing was in form an assignment to *Curtner* of *Cunningham's* interest in the crops, then the title thereto passed to *Curtner*. The trial court, in the light of all the evidence, construed this order as having the effect of an assignment, and we will not set aside that construction. * * * As against *Curtner*, no right of possession gained by the sheriff after the date of *Cropley's* order amounted to anything; and as to any right of possession the sheriff had prior to *Curtner's* order, that right was wiped out by the satisfaction of all the claims by execution and attachment which the sheriff held at that time against the property."

The case of *Curtner v. Lyndon*, *supra*, has been cited with approval numerous times. See *Donohoe-Kelly Banking Co. v. So. Pac. Co.*, 138 Cal. 183, 71 P. 93, 94 Am. St.Rep. 28; *Williamson v. Monroe*, 174 Cal. 462, 163 P. 662; *Fidelity, etc., Ass'n v. Rodgers*, 180 Cal. 683, 182 P. 426; *Cosby v. Cline*, 186 Cal. 698, 200 P. 801; *Brady v. Ranch Mining Co.*, 7 Cal.App. 182, 94 P. 85; *Title Ins. & Trust Co. v. Williamson*, 18 Cal.App. 324, 123 P. 245, 247; *Puterbaugh v. McCray*, 25 Cal.App. 469, 144 P. 149; *Baumgarten v. Cal.Pac. T. & T. Co.*, 127 Cal.App. 649, 16 P.2d 332, 335; *Oxnard School District v. Penn*, 132 Cal.App. 763, 23 P.2d 828.

Plaintiff urges that the order given by *Chapman* to the third party claimants, even though accepted by the *Riverside Citrus Association*, cannot be considered an assignment of the fruit growing on the trees as the assignment did not purport to convey the fruit but was an order on a fund to be created by the sale of the fruit after it was picked and marketed, which fund was not in existence at the time the order was given. This contention has been decided adversely to plaintiff in several of the cases already cited. In *Baumgarten v. California T. & T. Co.*, *supra*, the court said:

"However, it has been repeatedly held that where an order, such as the one at bar, is given for a valuable and adequate consideration, and with the intent to effect an assignment, it will as between the payee and the drawer operate as an equitable assignment taking precedence over subsequent assignments and judgment liens. *Wheatley*

**COMMERCIAL STANDARD INS. CO. v.
WINFIELD et al.**

Civ. 10274.

District Court of Appeal, First District,
Division 1, California.

Jan. 21, 1938.

Rehearing Denied Feb. 19, 1938.

1. Action $\S$ 53(2)

Where plaintiff, who had been paid collision loss with his insurer's knowledge, commenced action for injuries sustained in automobile collision, evidence that collision insurer did not intervene because defendant's insurer stated that collision insurer's claim could be determined after termination of original action, and that custom existed to hold subrogation claims in abeyance pending determination of personal injury claims supported finding that defendant and his insurer were estopped from asserting defense of splitting cause of action.

2. Action $\S$ 53(1)

Prohibition against splitting a cause of action is for the benefit of the defendant, and he may waive or renounce it by agreement.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by the Commercial Standard Insurance Company, as subrogee under an automobile collision policy, against William G. Mayer and others, for damages to an automobile which plaintiff had paid as insurer. Judgment for plaintiff, and defendant named appeals.

Affirmed.

John J. Taheny, of San Francisco, for appellant.

Robert G. Partridge, of San Francisco, for respondent.

TYLER, Presiding Justice.

Plaintiff corporation brought this action, as subrogee under an automobile collision insurance policy, for damages to an automobile of one Hughes which it had paid as insurance carrier. The accident was due to the negligence of appellant Mayer. The facts present the following situation:

One Rush Hughes, having a collision insurance policy on his automobile with plaintiff as insurance carrier, had an accident in which he and his wife were in-

v. Strobe & Wilcoxson, 12 Cal. 92, 73 Am. Dec. 522; Pierce v. Robinson, 13 Cal. 116; Pope v. Huth, 14 Cal. 403; Curtner v. Lyndon, 128 Cal. 35, 60 P. 462; McIntyre v. Hauser, 131 Cal. 11, 63 P. 69; Fidelity Sav., etc., Ass'n v. Rodgers, supra; Dunlap v. Commercial Nat. Bank, 50 Cal.App. 476, 195 P. 688.

"It is immaterial that there was no fund actually in the possession of the title company at the time of the execution of the order. The subject of the assignment was not the check or any particular fund of money, but was the right of the Blackmore Investment Company to receive the sum of \$18,000 upon compliance with the terms of the escrow. Money to become due at a future time upon the happening of a contingency may be the subject of an assignment. Pope v. Huth, supra; Bridge v. Kedon, 163 Cal. 493, 126 P. 149, 43 L.R.A. (N.S.) 404; Smitton v. McCullough, 182 Cal. 530, 189 P. 686; Bank of Yolo v. Bank of Woodland, 3 Cal.App. 561, 86 P. 820; Union Collection Co. v. Oliver, 23 Cal.App. 318, 137 P. 1082.

"The order was given for valuable and adequate consideration, to wit, the advance of \$15,000 by Stewart and respondent and the satisfaction of the indebtedness of the Blackmore Investment Company to Stewart in the sum of \$1,500 on account of engineering fees. An antecedent indebtedness constitutes a valuable consideration sufficient to support an equitable assignment. Smitton v. McCullough, supra.

"That the order was intended by the parties as an assignment is in accord with the evidence."

[2, 3] The construction of the order given by Chapman was a question of fact addressed, in the first instance to the trial judge. On all of the evidence before him the trial judge concluded that it was the intention of the parties to effect an immediate assignment of the growing crop. After reviewing this evidence, we cannot conclude that this conclusion was unreasonable or that it was not supported by the evidence. As said in Curtner v. Lyndon, supra: "The trial court, in the light of all evidence, construed this order as having the effect of an assignment, and we will not set aside that construction."

The judgment is affirmed.

I concur: BARNARD, P. J.

jured and his automobile damaged. They filed actions for personal injuries against defendants herein, and for damages to their clothing; the actions being commenced after the insurance carrier had paid Hughes his collision loss. An adjuster, Mr. Dinkelspiel, and others connected with the Associated Indemnity Corporation, the insurance carrier of appellant Mayer, took over full charge of the investigation and defense of defendants' case with their consent. After trial Hughes received a verdict of \$750, and his wife the sum of \$25,000. A motion for a new trial was granted in the matter of Mrs. Hughes and both claims of the husband and wife were subsequently settled by the parties for the sum of \$4,800.

The present plaintiff knew at all times of the pendency of these actions, but made no effort to intervene or to have the claim for the damage to the automobile which it had paid as insurance carrier set forth therein. Upon being sued appellant invoked the rule against the splitting of causes of action, claiming it operated against plaintiff. The evidence showed, however, that at all times plaintiff was seeking to recover from appellant and his insurance carrier the amount of its collision loss and that all parties to the transaction knew of its claim. The trial court found that the representative of appellant's insurance carrier had promised plaintiff that in the event appellant should be held liable for the injuries and damages complained of by Hughes and his wife appellant would pay to plaintiff the amount of its claim as prayed for herein. It further found that appellant by and through his agent, the Associated Indemnity Corporation, specially requested plaintiff to forbear in intervening, stating that plaintiff's claim could be determined after the termination of the actions referred to; that plaintiff relied upon such promises; and appellant and his agent were estopped from asserting the defense of splitting a cause of action.

[1,2] The sole point relied upon for a reversal is that the findings are unsupported. There is no merit in the contention as the facts fully support the findings of the trial court that appellant, through his representatives, agreed to pay the claim in the event he was held liable on the personal injury claim. It appeared in evidence that a custom exists among insurance companies whereby subrogation claims are

held in abeyance pending the determination of compensation cases involving personal injury claims, and appellant through his representatives requested plaintiff to forbear from joining in the action. Prohibition against splitting a cause of action is for the benefit of the defendant and he may waive or renounce it by agreement.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.



24 Cal.App.2d 415

CHURCHILL v. TITLE INSURANCE & TRUST CO. et al.

Civ. 2122.

District Court of Appeal, Fourth District,
California.

Jan. 17, 1938.

Hearing Denied by Supreme Court
March 17, 1938.

1. Appeal and error ☞907(3)

Where appeal from judgment in bondholder's action to foreclose street improvement bonds was upon judgment roll alone, all intendments and presumptions were in favor of validity of judgment, and if any matters could have been presented to trial court which would have authorized entry of judgment, it would be presumed that such matters were presented and that judgment was entered in accordance therewith.

2. Municipal corporations ☞567(1)

The Street Improvement Act provision that complaint of bondholder foreclosing street improvement bonds would be sufficient if it set forth copy of bond with coupons attached and with certain other allegations, did not make such method of pleading mandatory, and a bondholder's complaint would be sufficient if it alleged same facts which would be made to appear by setting forth bonds with coupons. St.1929, p. 1306, § 76a.

3. Municipal corporations ☞567(1)

In bondholder's action to foreclose street improvement bonds, complaint, which alleged all facts which would have appeared had copies of coupons which were attached to bonds been set forth as permitted by statute and which set forth terms of bonds, and amounts and due dates of coupons, was suf-

sufficient to state cause of action, although coupons were not set forth, in absence of demurrer or appearance on part of defendant, since method of pleading provided by street improvement statute was not mandatory. St.1929, p. 1306, § 76a; Const. art. 6, § 4½.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by E. Perry Churchill against the Title Insurance & Trust Company and others to foreclose certain street improvement bonds. From an adverse judgment, the named defendant appeals.

Affirmed.

P. Talbot Hannigan, of Los Angeles (Francis P. Harrington, of Los Angeles, of counsel), for appellant.

Musick & Burrell and Clayton Straub, all of Los Angeles (James E. Bednar, of Los Angeles, of counsel), for respondent.

BARNARD, Presiding Justice.

This is an action by a bondholder to foreclose a number of street improvement bonds issued on March 12, 1931, as payment for work done on certain streets or roads in the county of Orange.

Among other things, the complaint alleges that the bonds were issued by virtue of the County Improvement Act of 1921, St.1921, p. 1658, and all acts supplementary thereto, incorporated therein by reference, and amendatory thereof, including particularly the Street Improvement Act of 1911, St. 1911, p. 730, as amended, as then existing. It is then alleged that the bonds were in certain named amounts, with interest at 6 per cent., payable at the time and in the manner specified therein; that the bonds represent the cost of certain street work as more fully described in a certain assessment and diagram which is referred to; that the bonds are a lien upon described real property belonging to the appellant; that the bonds provide for interest on certain named dates and annually thereafter; that the bonds were in default in interest due on January 2, 1932; that no interest payments coming due after that date have been paid; that the bonds are further in default in that the principal payments due on January 2, 1932, have not been paid and no principal payments subsequently coming due under the terms of the bonds have been paid, although demand has been made; and that copies of the respective bonds are attached to the com-

plaint. The copies of the bonds thus set forth do not include copies of any of the coupons representing the serial payments of either principal or interest, but each bond is substantially in the form suggested in section 63 of the Street Improvement Act of 1911, St.1911, p. 759, as amended by St.1923, p. 278; Deering's Gen.Laws 1931, Act 8199. These bonds, as thus shown, fully disclose the due date and amount of each payment of principal and interest, and state that the respective payments are to be made upon presentation of coupons which are attached thereto. After setting forth what payments on these bonds are in default the complaint proceeds to allege that the holder has elected to and does declare the whole amount to be due and payable, that certain penalties have accrued, and that written notice and demand had been served on the appellant more than thirty days before the commencement of the action with notice of the delinquency, and that foreclosure suit would be brought unless the appropriate amounts were paid within thirty days.

The complaint was personally served on the appellant, and, no appearance having been made, its default was entered. After a hearing a decree of foreclosure and order of sale were entered, followed by a judgment. This appeal, which followed, is presented on the judgment roll alone, and the only question raised is whether the complaint states facts sufficient to constitute a cause of action. The appellant attacks the complaint in one respect only, contending that the failure to set forth copies of the coupons which were attached to the bonds renders the complaint insufficient as not complying with the provisions of section 76a of the Street Improvement Act of 1911, St.1911, p. 730, as added by St.1929, p. 1306, as then existing.

[1] Section 76a of that act as added by amendment in 1929, St.1929, p. 1306, continued a new and cumulative remedy given to the holder of such bonds by an amendment in 1921, St.1921, p. 297, § 76, including a simplified method of pleading and proof in such cases. *Jeffreys v. Point Richmond Canal, etc., Co.*, 202 Cal. 290, 260 P. 548. Among other things, section 76a then provided that: "The complaint in such suit shall be sufficient if a true copy of the bond be therein set forth and appropriate allegations be made therein regarding the payments made upon the principal and interest of such bond. If personal demand for payment be made as herein provided the

complaint shall so allege." It also provided: "The said bond, together with proof either orally by the said treasurer of the said city or by a certificate signed by him showing the nonpayment of any of the principal or interest upon said bond, shall be prima facie evidence of the right of the plaintiff to recover in said action; provided, that if personal demand for payment be made proof of service of the demand as herein provided shall be required." This appeal being upon the judgment roll alone, all intendments and presumptions are in favor of its validity, and if any matters could have been presented to the trial court which would have authorized its entry, it will be presumed, in support thereof, that such matters were presented, and that the judgment was entered in accordance therewith. *Caruthers v. Hensley*, 90 Cal. 559, 27 P. 411.

It may be conceded that this complaint is not a model, and that it would be better pleading to also set forth copies of the coupons, at least of those which had not yet been paid, but no demurrer was interposed, no appearance was made by the appellant, and no record of the evidence is before us. Under section 4½ of article 6 of the Constitution, a judgment may not be reversed because of any error in the pleadings unless a miscarriage of justice appears.

The respondent argues that it appears from the language used that section 76a of this act contemplates the setting forth of a copy of the bond itself without intending that copies of the coupons should be included. Some support for this theory is found in those portions of this act which relate to the issue of bonds, their collection, and the foreclosure of the liens represented thereby. Section 63 of the act purports to set forth a form for such bonds, but gives no form for the coupons. A number of these sections refer only to the bonds or to the coupons alone, while others refer to both. Throughout these sections the coupons are mentioned in connection with payments to be made to the treasurer and also in the provisions for a sale of the land by the treasurer on the demand of the holder of the bond. In either of these cases it is not to be presumed that the treasurer would have the original bond in his possession. The coupons are drawn, however, on the assumption that they will be paid when due and that the amounts named therein will thus be the correct amounts. At the time a foreclosure suit is filed in accordance with the provisions of section 76a certain

penalties have attached, the coupons no longer correctly state the amounts due, and the bond itself, presumably in the possession of the plaintiff, more fully discloses the extent of the obligation. It may be that the Legislature had these facts in mind and that it was intended, in providing for a simplified procedure, to approve the sufficiency of a complaint which sets forth a copy of the bond alone, without its coupons. Under the circumstances here appearing, we do not feel called upon to decide the question thus suggested.

[2] It will be noted that section 76a does not definitely and affirmatively require that any copy of the bond, whether accompanied by copies of the coupons or not, be set forth in the complaint. While it is provided that a complaint is sufficient which sets forth a copy of the bond, with certain allegations, the suggested form of pleading is not made mandatory or exclusive. In providing this additional remedy for a bondholder the intention was to provide for a somewhat simplified procedure and to this end it was provided that it should be sufficient to set forth a copy of the bond with certain other allegations. It does not follow that a complaint is necessarily insufficient if a copy of the bond is not set forth, much less if the copy of the bond is incomplete in that the attached coupons are not included. If the same facts which would be made to appear by setting forth the bonds with its coupons and by making the required allegations are made to appear by the allegations of the complaint and the copy of the bond itself, although copies of the coupons are not included, the purpose and intent of the statute would seem to be complied with. In the absence of anything to the contrary in the statute, general rules apply and such a complaint is also sufficient.

[3] In the instant case the complaint alleged all of the facts that would have appeared had copies of the coupons also been set forth, and, in the absence of a demurrer or appearance on the part of the appellant, it must be held that as to it the complaint was sufficient to constitute a cause of action. In addition to other facts the appellant was fully advised by the complaint as filed, not only of the terms of these bonds, but of the amounts and due dates of their respective coupons. No possible injury or prejudice to the appellant appears, and it must be assumed on the

present record that the evidence covered all matters which could affect the rights of the appellant or of any possible holders of any of the coupons.

For the reasons given, the judgment appealed from is affirmed.

I concur: MARKS, J.



24 Cal.App.2d 743

E. Perry CHURCHILL, Plaintiff and Respondent, v. TITLE INSURANCE & TRUST COMPANY (a Corporation) et al, Defendants; Title Insurance & Trust Company (a Corporation), Defendant and Appellant.

Civ. 2123.

District Court of Appeal, Fourth District, California.

Jan. 17, 1938.

Hearing Denied by Supreme Court
March 17, 1938.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

P. Talbot Hannigan, of Los Angeles (Francis P. Harrington, of Los Angeles, of counsel), for appellant.

Musick & Burrell and Clayton Straub, all of Los Angeles (James E. Bednar, of Los Angeles, of counsel), for respondent.

BARNARD, Presiding Justice.

The material facts involved in this appeal are exactly similar in all respects to those involved in Churchill v. Title Insurance & Trust Company et al., Cal.App., 75 P.2d 526, this day decided. The same question of law is presented, and for the

75 P.2d—34

reasons given in the case referred to and on the authority thereof the judgment herein appealed from is affirmed.

I concur: MARKS, J.



24 Cal.App.2d 744

E. Perry CHURCHILL, Plaintiff and Respondent, v. TITLE INSURANCE & TRUST COMPANY (a Corporation) et al, Defendants; Title Insurance & Trust Company (a Corporation), Defendant and Appellant.

Civ. 2124.

District Court of Appeal, Fourth District, California.

Jan. 17, 1938.

Hearing Denied by Supreme Court
March 17, 1938.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

P. Talbot Hannigan, of Los Angeles (Francis P. Harrington, of Los Angeles, of counsel), for appellant.

Musick & Burrell and Clayton Straub, all of Los Angeles (James E. Bednar, of Los Angeles, of counsel), for respondent.

BARNARD, Presiding Justice.

The material facts involved in this appeal are exactly similar in all respects to those involved in Churchill v. Title Insurance & Trust Company et al., Cal.App., 75 P.2d 526, this day decided. The same question of law is presented, and for the reasons given in the case referred to and on the authority thereof the judgment herein appealed from is affirmed.

I concur: MARKS, J.

24 Cal.App.2d 745

E. Perry CHURCHILL, Plaintiff and Respondent, v. TITLE INSURANCE & TRUST COMPANY (a Corporation) et al., Defendants; Title Insurance & Trust Company (a Corporation), Defendant and Appellant.

Civ. 2126.

District Court of Appeal, Fourth District,
California.

Jan. 17, 1938.

Hearing Denied by Supreme Court
March 17, 1938.

Appeal from Superior Court, Orange
County; H. G. Ames, Judge.

P. Talbot Hannigan, of Los Angeles
(Francis P. Harrington, of Los Angeles,
of counsel), for appellant.

Musick & Burrell, and Clayton Straub,
all of Los Angeles (James E. Bednar, of
Los Angeles, of counsel), for respondent.

BARNARD, Presiding Justice.

The material facts involved in this appeal are exactly similar in all respects to those involved in *Churchill v. Title Insurance & Trust Company et al.*, Cal. App., 75 P.2d 526, this day decided. The same question of law is presented, and for the reasons given in the case referred to and on the authority thereof the judgment herein appealed from is affirmed.

I concur: MARKS, J.



24 Cal.App.2d 410

CHURCHILL v. TITLE INSURANCE & TRUST CO. et al.

Civ. 2127.

District Court of Appeal, Fourth District,
California.

Jan. 17, 1938.

Hearing Denied by Supreme Court
March 17, 1938.

1. Municipal corporations ⇨567(2)

In action to foreclose street improvement bonds, complaint which complied with requirements of amended Street Improvement Act, providing street improvement bondholders with simplified method of pleading, was sufficient, as against contention complaint should have alleged passage of resolution of intention, making of surveys, maps, and esti-

mates, resolution awarding work, performance of work, and making of certificates and assessments required by law. St.1911, p. 730, as amended; St.1921, p. 1658, as amended; St.1929, p. 1306, § 76a.

2. Alteration of instruments ⇨27(1)

Where a printed contract form is used and an alteration is made in the printed matter, the presumption is that it was made prior to the execution of the contract.

3. Appeal and error ⇨1008(1)

The question as to whether an instrument has been altered after execution is in first instance one for trial court, and his conclusion should be accepted by reviewing court, in absence of anything in record showing his judgment was improperly exercised.

4. Alteration of instruments ⇨24(2)

In action to foreclose street improvement bonds, bonds which were executed on printed forms in which provision relating to interest was changed by deleting one word and inserting another, so as to lower interest rate, were admissible without explanation of the alteration by bondholder, where evidence clearly indicated alteration occurred prior to execution of bonds. St.1911, p. 730, as amended; St.1921, p. 1658, as amended.

5. Trial ⇨79

In action to foreclose street improvement bonds, defendant, who objected to introduction of bonds on ground they showed on their face that they had been altered, should have renewed its objection when bonds were subsequently admitted after having been examined by trial court.

6. Municipal corporations ⇨950

Under statute providing for appointment of engineer of work to perform duties of city engineer and providing that improvement work could be done under direction of engineer of work, resolution ordering work to be done under direction of superintendent of highways was sufficient, as regards validity of street improvement bonds. St. 1911, p. 730, as amended; St.1921, p. 1658, as amended; St.1925, p. 729, § 1.

Appeal from Superior Court, Orange
County; James L. Allen, Judge.

Action by E. Perry Churchill against the
Title Insurance & Trust Company and others to foreclose street improvement bonds.

From an adverse judgment, the named defendant appeals.

Affirmed.

P. Talbot Hannigan, of Los Angeles (Francis P. Harrington, of Los Angeles, of counsel), for appellant.

Musick & Burrell and Clayton Straub, all of Los Angeles (James E. Bednar, of Los Angeles, of counsel), for respondent.

BARNARD, Presiding Justice.

This is an action by a bondholder to foreclose a number of street improvement bonds issued on November 22, 1929, as payment for work done on certain streets or roads in the county of Orange. A demurrer to the complaint was overruled, an answer was filed, and a trial was had followed by a judgment in favor of the plaintiff, from which one of the defendants has appealed.

Among other things, the complaint alleges that the bonds were issued by virtue of the County Improvement Act of 1921, St.1921, p. 1658, as amended, and all acts incorporated therein including particularly the Street Improvement Act of 1911, St. 1911, p. 730, as amended. It is then alleged that the bonds were in certain named amounts with interest at 6 per cent. payable at the time and in the manner specified therein; that the bonds represented the cost of certain street work as more fully described in a certain assessment and diagram which is referred to; that the bonds are a lien upon certain described real property belonging to the appellant; that the bonds are in default in certain respects which are set forth; that the plaintiff has elected to declare the whole amount of the principal of said bonds due and payable; that certain penalties have accrued; and that written notice and demand that payment be made within thirty days had been served. Copies of the bonds, including copies of the coupons, are attached to the complaint.

At the trial the respondent introduced the bonds in evidence with proof that they had been signed and issued by the then county treasurer, introduced a certificate of the present county treasurer and oral evidence showing what payments had been made upon the bonds and what payments therein provided for were delinquent, and made proof of the service of a notice and demand for payment and the filing of a lis pendens. In presenting its case the appellant introduced in evidence a resolution of the board

of supervisors ordering the work which has resulted in the issuance of the bonds, which resolution ordered the work done under the direction of "Nat H. Neff, a County Employee of said County, to wit, the Superintendent of Highways," and that the materials used "shall comply with the specifications and be to the satisfaction of said Nat H. Neff, instead of the County Surveyor of said County."

The first point raised by the appellant is that the complaint was insufficient in that it failed to allege the passage of a resolution of intention, the making of surveys, maps, and estimates, a resolution awarding work, the performance of the work, and the making of the certificates and assessments required by the Improvement Act of 1911 and the County Improvement Act of 1921.

[1] This is an action to foreclose the lien of a street bond, as distinguished from an action to foreclose the lien of an assessment, under a new and cumulative remedy given to the holder of such bonds by an amendment in 1921, St.1921, p. 297, § 76, and continued in the provisions of section 76a of the Street Improvement Act of 1911 as added in 1929, St.1929, p. 1306. A simplified method of pleading and proof in such cases was furnished by these amendments (*Jeffreys v. Point Richmond Canal, etc., Co.*, 202 Cal. 290, 260 P. 548), and section 76a then provided that: "The complaint in such suit shall be sufficient if a true copy of the bond be therein set forth and appropriate allegations be made therein regarding the payments made upon the principal and interest of such bond. If personal demand for payment be made as herein provided the complaint shall so allege." With respect to the proof required, that section also provided: "The said bond, together with proof either orally by the said treasurer of the said city or by a certificate signed by him showing the nonpayment of any of the principal or interest upon said bond, shall be prima facie evidence of the right of the plaintiff to recover in said action; provided, that if personal demand for payment be made proof of service of the demand as herein provided shall be required." The complaint here complied with the requirements of this statute as did the respondent's proof, and a prima facie case was made out under the terms of the statute. The prima facie case thus made out was not met by the appellant, and no attempt was made at the tri-

al, or is here made, to show that the necessary jurisdictional steps had not been taken. See *Chase v. Trout*, 146 Cal. 350, 80 P. 81. In so far as anything here brought to our attention is concerned, the complaint was sufficient. The questions of evidence raised by the appellant will be hereafter considered.

[2-5] It is next contended that the bonds in question were improperly received in evidence because it appears upon their face that the rate of interest had been changed from 7 per cent. to 6 per cent. It appears that a printed form of bond was used in which, in the provision relating to interest, the word "seven" was deleted by a red typewritten line and the word "six" was inserted in red type. We think any burden resting upon the respondent was sufficiently met, and that the bonds were properly admitted in evidence for several reasons. See Code Civ.Proc. § 1982. Where a printed form is used and an alteration is made in the printed matter, the presumption is that it was made prior to the execution of the contract. *Corcoran v. Doll*, 32 Cal. 82. The question as to whether the instrument "appears" to have been altered after execution is in the first instance one for the trial judge, and his conclusion should be accepted by an appellate court in the absence of anything in the record showing that his judgment was improperly exercised. **Meyer v. Lovdal*, 6 Cal.App. 369, 92 P. 322. The appellant makes no contention that these bonds were in fact altered after execution and delivery, but rests entirely on the contention that the alteration was not sufficiently explained. Not only was a printed form thus changed, but the amounts set forth in the interest coupons disclose that the semiannual interest payments were computed at 6 per cent., which rather conclusively shows that the alteration was made before the bonds were delivered. The bonds were examined by the trial judge, and a deputy treasurer testified that she saw these bonds in the treasurer's office when they were issued and that she believed that the alteration had been made when she first saw them and before they were delivered to the contractor. It may be further observed that the introduction of the bonds into evidence was objected to on this ground when they were first offered, that thereafter the bonds were examined by the trial

judge, and the evidence referred to was received after which they were admitted with no further objection or motion to strike. Under these circumstances if the appellant believed the evidence offered to meet his objection to have been insufficient for that purpose, he should have renewed his objection when the bonds were again offered in evidence.

[6] The only other point raised is that the judgment is erroneous because the resolution ordering the work did not comply with the statutes, in that it ordered the work done under the direction of the superintendent of highways; it being further argued that it does not appear that such person is an engineer or that he might lawfully act as the surveyor's substitute. Section 1 of the County Improvement Act, St. 1921, p. 1658, as in force at the time here in question, see St. 1925, p. 729, provides that the board of supervisors may appoint "an engineer of work, in which event the duties to be performed by the city engineer as set forth in the improvement act of 1911 shall be performed by said engineer of work," and that the board may provide that the work shall be done "under his direction and to his satisfaction and that the materials used shall comply with the specifications and be to the satisfaction of such engineer of work instead of said county surveyor and may provide that he shall make and sign the assessment instead of the county surveyor." In the resolution ordering the work here in question, the board of supervisors stated that they desired the work to be done under the direction of the superintendent of highways, and in directing the work to be so done the resolution substantially follows the language used in section 1 of the act, as above referred to. What is an engineer of work is not defined by the statute, but it rather conclusively appears that the board attempted to comply with that provision of the statute and nothing in the record before us indicates that the person appointed had not the necessary qualifications, and the appellant does not even contend that such is the fact. We therefore hold that this point is without merit.

For the reasons given, the judgment appealed from is affirmed.

I concur: MARKS, J.

24 Cal.App.2d 391

PEOPLE v. McGEE.

Cr. 356.

**District Court of Appeal, Fourth District,
California.**

Jan. 14, 1938.

1. Criminal law ⇨1141(2), 1144(1)

An accused has burden to show error, if any, committed by trial court, and in absence of anything to show the contrary, it is presumed in favor of conviction under Habitual Criminals Statute that necessary facts upon which to base conviction were before court. Pen.Code § 644, as amended by St.1935, p. 1699.

2. Criminal law ⇨1141(2)

An appellant has the burden of showing error.

3. Criminal law ⇨1202(7)

Reviewing court could not, from mere allegation of information that accused had been convicted of a felony and had served a term of imprisonment in a state reformatory, hold that such prior conviction was not one within meaning and intent of habitual criminal statute. Pen.Code § 644, as amended by St.1935, p. 1699.

4. Criminal law ⇨1202(1)

Conviction in foreign state for attempting to pass forged instrument which would have been punishable as a felony in California constituted a conviction upon which status of accused as an habitual criminal could be fixed under habitual criminal statute. Pen.Code §§ 470, 668, and § 644, as amended by St.1935, p. 1699.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Theodore McGee was convicted of a felony and was adjudged to be an habitual criminal, and, from an order denying defendant's motion to modify the judgment of conviction by striking out the portion thereof adjudging him to be an habitual criminal, the defendant appeals.

Order affirmed.

Theodore McGee, in pro. per.

U. S. Webb, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was charged in an information filed in Riverside county with the

commission of a felony and also with three prior convictions of felonies, and was found guilty. On February 27, 1936, he was sentenced to confinement in the state prison "for the term as prescribed by law for life as an habitual criminal, and that he not to be eligible for release on parole until he has served a minimum of at least twelve (12) years." On April 7, 1937, the defendant filed in the superior court of Riverside county notice of a motion to modify the judgment by striking out the portion thereof adjudging him to be an habitual criminal, upon the ground that that portion of the judgment is illegal, in that it is founded upon an information charging three prior convictions while only one of those prior convictions comes within the meaning and import of section 644 of the Penal Code, as amended by St. 1935, p. 1699, as limited by section 668 of that Code. This appeal is from an order denying that motion.

The appellant contends that the judgment is absolutely void upon its face because he was charged with three prior convictions which, if proved, would under section 644 of the Penal Code, as amended, have subjected him to imprisonment for life without the possibility of parole, while the judgment as rendered sentenced him as an habitual criminal, but eligible to parole after twelve years. It is argued that this indicates that "the court of Riverside county was not certain as to some of the prior convictions," and that the judgment is therefore void upon its face. It is also argued that as a matter of fact two of the prior convictions alleged in the information are not such within the meaning and effect of section 644 of the Penal Code, as amended.

The information charges that the appellant was convicted in the United States District Court for the Northern District of Oklahoma of the crime of a felony, to wit, possession and sale of whisky, that judgment was pronounced, and that he served a term of imprisonment therefor in the United States penitentiary at Fort Leavenworth. It is next charged that the appellant was convicted in the district court of the state of Oklahoma in and for the county of Washington of the crime of a felony, to wit, the larceny of an automobile, that judgment was pronounced, and that he served a term of imprisonment therefor in the state prison. It is further charged that the appellant was in the district court of Oklahoma in and for the county of Wash-

ington convicted of a crime of a felony, to wit, attempting to pass a forged instrument, that judgment was pronounced, and that he served a term of imprisonment therefor in the state reformatory.

[1-3] No contention is made that the conviction for larceny of an automobile does not come within the purport and meaning of section 644 of the Penal Code, as amended. The respondent concedes that the conviction of possession and sale of whisky is not one of the crimes listed in that section. So far as the merits of this case are concerned, the correctness of the judgment depends upon whether the conviction of the appellant on the charge of attempting to pass a forged instrument and his punishment therefor is such a prior conviction as comes within the provisions of section 644, as amended. The appellant contends that it does not because the crime charged in that connection, that of attempting to pass a forged instrument, is not one of the crimes mentioned in section 644, and because that section of the Penal Code, as amended, is based upon the serving of a term in any state prison or federal penitentiary, and not upon the serving of a term in a state reformatory. In connection with the latter of these contentions the appellant states in his brief that he served this term in a boys' reformatory and not in a men's reformatory. But the record before us shows nothing in this connection, except the allegation in the information. It is incumbent upon the appellant to show error if any existed, and in the absence of anything to show the contrary it must be presumed, in favor of the judgment, that the necessary facts were before the court, and it cannot be held from the allegation of the information alone that this particular prior conviction was not one within the meaning and intent of section 644. In *re Brady*, 5 Cal.2d 224, 53 P.2d 945.

[4] Appellant's main contention with respect to the insufficiency of the prior conviction which we are now considering is that the crime of attempting to pass a forged instrument is not named in section 644 as one of the crimes for which a conviction shall be considered in fixing the status of a defendant as an habitual criminal. Section 668 of the Penal Code brings within the purview of section 644 any offense committed in another state which would have been punishable by imprisonment in the state prison if committed in this state. Section 470 of the Penal Code, in defining forgery,

declares that any one who utters, publishes, passes, or attempts to pass as true and genuine any of the instruments which are made the subjects of forgery in the section is guilty of forgery. In so far as here appears, the offense with which the appellant was charged and convicted in the Oklahoma court is by this section particularly declared to be a forgery, which offense is included in the crimes listed in section 644. Under the Code sections which have been mentioned, the prior conviction in question was one which could properly have been considered by the court in passing judgment. In so far as here appears, two prior convictions were proven bringing the appellant within one of the classes of habitual criminals mentioned in section 644. It follows that the judgment as rendered instead of being absolutely void was not even erroneous.

The respondent raises the further point that under the circumstances here appearing an appeal does not lie from an order denying a motion to modify a judgment. We have preferred to consider the appeal upon its merits without considering that question.

The order appealed from is affirmed.

I concur: MARKS, J.



24 Cal.App.2d 490

URE v. MAGGIO BROS. CO., Inc., et al.

Civ. 2105.

District Court of Appeal, Fourth District,
California.

Jan. 21, 1938.

Hearing Denied by Supreme Court
March 21, 1938.

1. Death ☞11, 78

The right of action for a wrongful death is wholly statutory, and hence statutory rule is the only measure of damages. Code Civ. Proc. § 377.

2. Death ☞78

The courts are limited in applying the statutory rule with respect to measure of damages for wrongful death to applying rule to particular cases, construing the rule with a view to effecting its object and to promote justice under statute. Code Civ. Proc. §§ 4, 377.

3. Death ⇨85

The damages recoverable for death of an adult are limited to pecuniary loss suffered by persons for whose benefit the right of action is given from death or injury of victim. Code Civ.Proc. § 377.

4. Death ⇨85

In mother's action for death of adult daughter, mother's life expectancy furnished the limit of time during which damages might accrue, since damages awarded must be compensation for pecuniary loss suffered by mother. Code Civ.Proc. § 377.

5. Death ⇨71

If an action for death of an adult is brought by an aged plaintiff, condition of plaintiff's health is a proper subject for inquiry, as evidence thereof bears upon probable life expectancy of plaintiff, and plaintiff's life expectancy furnishes the limit of time during which damages might accrue. Code Civ.Proc. § 377.

6. Death ⇨77

In mother's action for death of adult daughter who had acted as mother's nurse, companion, and housekeeper, evidence was insufficient to show that mother had more than normal life expectancy of about five years which actuaries gave to persons of her age, as respects whether damages awarded mother were excessive. Code Civ.Proc. § 377.

7. Death ⇨87

As respects pecuniary loss sustained by mother through death of adult daughter who lived with mother and acted as mother's nurse, companion, and housekeeper, the value of board and room furnished by mother to daughter should have been offset against value of daughter's services. Code Civ. Proc. § 377.

8. Death ⇨86(1)

One element of damage suffered by parent for death of adult child is present value of future financial assistance parent might reasonably expect from a continuance of child's life or present value of such future services as parent could reasonably expect had child lived, but the amount of such damages must be based on expectancy of parent's life. Code Civ.Proc. § 377.

9. Death ⇨88

The pecuniary loss sustained through death of adult may include pecuniary loss arising from the deprivation of society, comfort, and protection of the decedent, but such

loss may not include an award as a solatium for wounded feelings. Code Civ.Proc. § 377.

10. Death ⇨97

The jury has some discretion in estimating damages for death of adult, but such discretion is limited by rule that pecuniary value of loss is measure of damages, and the amount allowed must bear some reasonable relation to pecuniary value. Code Civ.Proc. § 377.

11. Death ⇨99(5)

\$10,000 awarded to mother with life expectancy of five years for death of adult daughter who had acted as mother's nurse, companion, and housekeeper, and who had been furnished with board and room by mother, was excessive, in absence of showing of reasonable value of daughter's services to mother and of value of benefits conferred on daughter by mother in furnishing board and room. Code Civ.Proc. § 377.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action for wrongful death by Margaret Grove Ure against Maggio Brothers Company, Inc., and another. From a judgment for the plaintiff, the defendants appeal, attempting to appeal also from an order denying a motion for a new trial.

Attempted appeal from order denying motion for a new trial dismissed, and judgment reversed and cause remanded for a new trial, with directions.

Hugh B. Rotchford, of Los Angeles, Loyal C. Kelly, of Riverside, and Robert E. Ford, of Los Angeles, for appellants.

Arthur W. Henderson, of Pittsburgh, Pa., and Kenneth Evan Schwinn, of Riverside, for respondent.

MARKS, Justice.

This is an appeal from an order denying a motion for a new trial, and a judgment whereby plaintiff recovered general damages in the sum of \$10,000, and special damages in the sum of \$881.23 for the death of her daughter. Defendants admit liability and that the evidence sustains the findings of special damages. The only question presented for our consideration is that the general damages awarded, in the sum of \$10,000 find no evidentiary support and are excessive.

[1-3] The action was brought under the provisions of section 377 of the Code

of Civil Procedure. The rules governing the amount of recovery in cases of this kind are set forth in *Bond v. United Railroads*, 159 Cal. 270, 113 P. 366, 369, 48 L.R.A., N.S., 687, Ann.Cas.1912C, 50, as follows:

"The rights of action being wholly statutory, the statutory rule is the only measure of damages. All the court can do is to apply it to particular cases, construing the rule in the same manner as other Code provisions, liberally, 'with a view to effect its objects and to promote justice.' Code Civ.Proc., § 4. The rule of damages stated in the last clause of section 377 is expressly made the only rule to be applied in any action under either section. * * * In actions by a parent, either for the death or the injury of a child, the damages to be allowed are those, and those only, which have been, or may be suffered by the parent. No damages can be given in such an action for pain or anguish inflicted on the child, or for any pecuniary injury personal to such child. *Durkee v. C. P. R. R. Co.*, 56 Cal. 388, 38 Am.Rep. 59. In all actions, under either section, the damages are limited to the pecuniary loss suffered by the person or persons for whose benefit the right of action is given from the death or injury of the victim. *Morgan v. S. P. Co.*, 95 Cal. [510] 516, 30 P. 603, 17 L.R.A. 71, 29 Am.St.Rep. 143; *Sneed v. Marysville, etc., Co.*, 149 Cal. [704] 710, 87 P. 376, and the numerous cases there cited; *Johnson v. S. P. Co.*, 154 Cal. [285] 298, 97 P. 520; *Hale v. San Bernardino, etc., Co.*, 156 Cal. [713] 716, 106 P. 83. * * *

"In cases arising under section 377, referring to adults only and where the pecuniary loss of those who are heirs of the victim are to be considered and estimated, this is the settled rule. In *Sneed v. Marysville, etc., Co.*, 149 Cal. [704] 710, 87 P. 376, [supra], the victim was an adult unmarried man, 22 years of age, his father and mother being apparently the only heirs. He was living with them and working out for himself. The court said: 'This pecuniary loss may be either a loss arising from the deprivation of something to which such heirs would have been legally entitled if the person had lived, or a loss arising from a deprivation of benefits which from all the circumstances of the particular case, it could be reasonably expected such heirs would have received from the deceased had his life not been taken, although the obligation resting on him to bestow such benefits

on them may have been a moral obligation only.'"

[4] The accident in which Mary Ray Ure, the daughter of plaintiff, was killed, happened on March 28, 1936. At that time the plaintiff, aged seventy-nine years, had a normal life expectancy of about five years, and Mary, aged forty-seven years, of slightly more than twenty-three years. As the damages awarded must be compensation for the pecuniary loss suffered by plaintiff, her life expectancy furnishes the limit of time during which the damages may accrue and for which they may be awarded. *Griffey v. Pacific Electric Ry. Co.*, 58 Cal.App. 509, 209 P. 45, 49.

Deceased was a lady of refinement. She had been educated as a musician and had taught music until 1916. During that year she entered upon the study of theology in the Pittsburgh Bible Institute. She completed these studies in 1921 and was ordained as a minister by the Evangelization Association of that organization. She lived at the institute until 1928, assisted in religious instruction and served there as a Bible teacher and musician. She was also in charge of a mission in or near the city of Pittsburgh. She received no salary for her services; only donations from communicants.

In 1928 deceased moved to her mother's apartment in Pittsburgh and until early in 1935, served as housekeeper, companion, and, during 1933 and 1934, as nurse for her mother. After she took up her residence with her mother she gave up her position with the Bible institute but continued to assist at the mission.

Deceased's sister, Frances McClelland Ure, was also a minister of the gospel. She had been ordained by the same authority as Mary. Frances was pastor of a church in Farmingdale. In March or April, 1935, Mary went to her sister's home in Farmingdale where she assisted in conducting church services. During this time the sisters made preparations for a motor trip to California. Frances secured a leave of absence of one year from her church and the two sisters left Farmingdale in July, 1935, expecting to make the trip to California and return within the year.

The denomination to which the two sisters belonged paid their pastors no salary, but permitted them to retain certain donations out of which they were supposed to pay living expenses. On the trip west the sisters conducted a series of revival meet-

ings. They were given rooms and meals by members of the churches and were permitted to retain donations made at the meetings. They alternated in conducting services, each retaining the donations made at the meeting she conducted. They each paid their own traveling expenses between meeting places with the exception that Frances paid all expense of operating the automobile in which they traveled as she had a little money at the start of the trip. Mary's income was not sufficient to pay her expenses and her income on the trip was augmented by several small gifts made by her mother. Mary was killed west of Indio in Riverside county on March 28, 1936.

Frances described the services which Mary rendered her mother from 1928 to 1935, as follows: "She did everything, she cared for mother, she kept the house for mother, she cooked, cared for her physically as a nurse; she took charge of the housekeeping."

Plaintiff described Mary's services as follows:

"A. Well, when Mary first came home I was pretty well; but later than that, it was in 1933 and 1934, that I had a very serious illness.

"Q. And what, if anything, did Mary do in connection with the home? A. She did everything in the world that loving hands could do, or hands that might have been employed to do, except the scrub work and the laundry.

"Q. Will you explain to the court what she did? A. During my illness she took charge of the finances, and she just made the home. She did anything that a homemaker would do.

"Q. Did she perform the services of — A. Of a nurse to me.

"Q. Did she perform the services of a nurse? A. To me.

"Q. To you, during your illness? A. As no hired nurse could have done it.

"Q. Who did the cooking? A. She did. A woman did the cleaning, but Mary did the regulation work of the home, and the marketing, and taking charge of things for me in every possible way.

"Q. If I understand you correctly, she did everything incident to maintaining the home for you? A. Yes, sir. It would not have been a home.

"Q. Except that you did hire the scrubbing or cleaning, and laundry done by outside help? A. Yes, sir.

"Q. How long were you ill, and for how long a period did Mary do this? A. Well, it was during 1933 and 1934 that I was really not able to do things. * * *

"Q. And during the time from 1928 down to 1935, when she lived with you, did she in any way contribute to the expense of maintaining the home? A. No; she did not receive enough to do that.

"Q. Who maintained and paid the expenses of the home? A. I did. But I always had a feeling, when I say 'I', that it was 'we.'

"Q. And from 1933 down to the Spring, May of 1935, you say Mary took charge of the finances. Will you explain what you mean by that? A. I just mean that I was not able to go back and forth and do things, and that she took charge of it for me.

"Q. She took charge of your funds, and paid the expenses out of your money? A. Yes, sir.

"Q. She did not furnish the money to pay for the upkeep of the home, herself? A. No, sir. * * *

"Q. Did Mary receive any compensation for her services at this Mission? A. No. It was just a service of love.

"Q. Did she earn any moneys herself from any source? A. No.

"Q. You supported her and the home, did you? A. It was our home.

"Q. The funds to support the home you contributed? A. Yes, sir."

The plan of life of Mary and her mother to be entered upon after the trip to California is thus described by plaintiff: "She was to be my caretaker, and come and live with me, and do what she could outside that she wanted to do, but live with me and care for me."

[5, 6] The condition of the health of an aged plaintiff is always a proper subject for inquiry in actions of this kind as such evidence bears upon the probable life expectancy of the plaintiff. In reply to a question put to Frances concerning her mother's health for two or three years immediately prior to the spring of 1935, she replied, "She was not well." Plaintiff's testimony concerning her state of health prior to 1935 has been quoted. She further testified that since 1935 she had been "remarkably well." Under this state of the record there is no justification for concluding that plaintiff had more than the normal life expectancy of about five years which actuaries give to persons of her age.

It is clear that deceased had no earnings, as such are usually known, for many years before her death, and that under the plan of the future life to be entered upon by her mother and herself, she would have had no earnings, had she lived, during the balance of her mother's life.

[7] The evidence bearing upon the value of the services to be performed by Mary for her mother, had Mary lived, is extremely sketchy. There is no showing of the size of the apartment which Mary kept for the plaintiff. There is no showing of the time Mary had devoted to this work. There is no proof of the reasonable value of these services. Proof of the reasonable value of the services of a housekeeper is easy to obtain. The value of the board and room furnished by plaintiff to Mary is also capable of proof and should have been offset against the value of Mary's services. *Griffey v. Pacific Electric Ry. Co.*, supra. As Mary had no income it is probable that plaintiff had furnished her with clothes and personal effects. The record is silent on this question.

[8-10] In the case of *Griffey v. Pacific Electric Ry. Co.*, supra, a father, fifty-eight years of age, recovered \$8,000 for the death of a daughter twenty-four years of age who at the time of her death was acting as his housekeeper. An appeal was taken from an order granting a new trial. In affirming the order because of excessive damages it was said:

"Though one of the elements of damage which may be suffered by the parent of an adult child is the present value of such future financial assistance as the parent might reasonably expect from a continuance of the child's life, or the present value of such future services as the parent could reasonably expect to have received, had the child lived, still, in estimating the amount of such damages, it is the expectancy of life of the parent, not the life of the child, which is to be taken into consideration; for, as is usually the case, the child's expectancy of life exceeds that of the parent. *Fordyce v. McCants*, 51 Ark. 509, 11 S.W. 694, 4 L.R.A. 296, 14 Am.St.Rep. 69 [supra]. See, also, *Parsons v. Easton*, 184 Cal. [764] 770, 195 P. 419 [supra]. And in estimating the pecuniary value to the parent of the services of an adult child, the jury should take into account the value of any board and lodging or other accommodations which the parent

may be furnishing to the adult child, if the latter is living with his parent.

"Besides the pecuniary loss arising from the deprivation of direct financial assistance or from the deprivation of services, there may be, as we have said, a pecuniary loss arising from the deprivation of the 'society, comfort, and protection' of the decedent. *Beeson v. Green Mountain Co.*, 57 Cal. [20] 38; *Parsons v. Easton*, supra. But while loss of society, comfort, and protection may be an element of the injury sustained by the statutory beneficiaries, it is only the pecuniary, and not the sentimental, value of such loss which may be taken into consideration in the assessment of damages. Nothing can be recovered as a solatium for wounded feelings. * * *

"Unless, therefore, the daughter's society had a very considerable pecuniary value for the father, the award of \$8,000 was grossly excessive. It is true that in estimating the damage which a surviving spouse, parent, or child may have sustained by being deprived of the society, comfort, and protection of the deceased, some latitude must be allowed to the discretion of the jury; for it is not possible to measure in exact terms of money the damage resulting from a loss of that character. But it must never be forgotten that, in fixing the amount, the jury is always bound by the fundamental rule that the pecuniary value of the society, comfort, and protection is the limit of recovery for a loss of that character, and the amount allowed therefor must have some reasonable relation to the pecuniary value shown by the evidence. In this case the father doubtless dearly loved his daughter; but—it is pecuniary loss only, and not the loss of an object of love and affection, that the law recognizes as ground for allowing damages to the heirs of one whose death has been caused by the negligence of a third person.' *Parsons v. Easton*, supra."

In *Ray v. Pacific Gas & Electric Co.*, 3 Cal.App.2d 329, 39 P.2d 812, 817, the court held the awards of \$12,500 in favor of each of two adult children for the deaths of their parents grossly excessive. The court there said: "The action is brought under section 377 of the Code of Civil Procedure, which authorizes a jury to award such damages 'as under all the circumstances of the case, may be just.' A number of cases, wherein the contention that the damages allowed were excessive was not sustained, are cited by respondents in support of these verdicts. The verdicts in those cases were

generally for smaller amounts than those in the case at bar, and involved other elements than those here relied upon, such as the loss of support by wives or minors or dependents. The most liberal of them is the late case of *Gilmore v. Los Angeles Ry. Corp.*, 211 Cal. 192, 295 P. 41, 45. There a verdict of \$7,500 in favor of a widow and two adult children was upheld. It was based upon the loss by the wife of her legal right of support and of the comfort and care which all three might have expected to receive from the deceased; and the court takes occasion to point out that the 'loss of comfort, protection, and society is a proper element of injury and is by no means to be classed as compensable by merely nominal damages.' Measured even by the standard of this case, the verdicts here are in our opinion grossly excessive."

The case of *Dickinson v. Southern Pacific Co.*, 172 Cal. 727, 158 P. 183, 184, is of assistance here. The action was brought by the administrator of the estate of Samuel Dickinson to recover damages for his death on behalf of his heirs. General damages in the sum of \$10,000 were awarded. In reversing the judgment the Supreme Court said:

"It appeared in the evidence that at the time of the accident Samuel Dickinson was of the age of 78 years and 9 months. He was survived by a wife, two sons, two daughters, and eight grandchildren. One of the grandchildren was living with Samuel Dickinson and his wife. Dickinson's occupation was that of a farmer. The only evidence of his earnings in that calling was that of the plaintiff, his son, who testified that the income of the decedent from his farm was \$1,000 a year, and that the rental value of a place like that which he occupied would be about \$300 a year. This left a return, from his labor and personal efforts, of seven hundred dollars per year; but this, as the witness testified, did not take into account any deduction for living expenses. The widow testified that her husband had been in good health and able to do a good day's work; that her life with him was pleasant, his habits good, and his companionship pleasant and agreeable.

* * *

"It is not possible to measure in exact terms of money the loss which a surviving husband, wife, or child may have sustained through being deprived of the comfort and society of the deceased spouse or parent.

For this reason, some play is allowed to the discretion of the jury by the provision of section 377 that such damages may be allowed as under all the circumstances of the case may be just. But, in fixing the amount, the jury is always bound by the fundamental rule that pecuniary damage is the limit of recovery, and the amount allowed must bear some reasonable relation to the pecuniary loss shown by the evidence.

"Here, as we have seen, the deceased had a probable expectancy of less than five years of life. His earnings, assuming that they would all have been applied for the benefit of his family, would have amounted to less than \$3,500, during the probable remaining span of his years. The verdict for \$10,000, can therefore be sustained only upon the theory that his life, apart from any contributions he might make from his earnings, had a pecuniary value of more than \$6,500 to his widow and heirs. There is no evidence to justify such a conclusion. Eliminating, as we must, any consideration of the grief and mental suffering occasioned to the survivors by the death, it is impossible to conceive how the loss of the comfort, society, and protection of the deceased could have had a money value of anything like the amount awarded by the jury. Verdicts have frequently been set aside where the disproportion between the loss proven and the amount awarded was not so great as that which appears here. [Citing cases.]"

[11] When we measure the facts of the instant case by the rules we have cited, and compare the amount here awarded the single plaintiff, with the awards held excessive where there were several plaintiffs, each of whom was entitled to compensation for his pecuniary loss, the conclusion is inevitable that the award of \$10,000 general damages cannot be sustained without some competent evidence supporting the finding that the services which would have been rendered by Mary, had she lived, during the five years of the normal life expectancy of plaintiff were reasonably worth the net sum of \$10,000, or \$2,000 per year. The reasonable value of such services were susceptible of proof. The reasonable value of the benefits conferred on Mary by plaintiff in furnishing a home and the expenses of life were equally susceptible of proof. No such proof is in the record. We conclude, therefore, that the finding of general damages in the sum of \$10,000 is

not supported by the evidence, and that on the record before us damages in that amount must be held to be excessive.

The judgment is therefore reversed and the cause is remanded for new trial, solely upon the issue of the amount of general damages, with directions to the trial court to render judgment in favor of plaintiff for the amount of damages so found upon a determination of that issue, plus special damages in the sum of \$881.23. The attempted appeal from the order denying the motion for new trial is dismissed.

I concur: BARNARD, P. J.



24 Cal.App.2d 517

CAREY v. KRAFT-PHENIX CHEESE CORPORATION et al.
Civ. 5881.

District Court of Appeal, Third District,
California.

Jan. 24, 1938.

Hearing Denied by Supreme Court
March 25, 1938.

1. Good will ⚡1

The good will incident to a business constitutes a "property right." Civ.Code, §§ 655, 993.

[Ed. Note.—For other definitions of "Property Rights," see Words & Phrases.]

2. Good will ⚡5

Conflicting evidence held to authorize finding that manufacturer purchased from distributor the exclusive right to distribute such manufacturer's products in specified territory theretofore held by such distributor, for specified price that was not paid. Civ. Code, §§ 655, 993.

3. Good will ⚡5

Where distributor bought exclusive territory for marketing of manufacturer's goods from former distributor, and thereafter bought goods from manufacturer outright, receiving title and paying for goods whether he was able to resell them or not, and distributor had right to sell his territory independently of manufacturer or of manufacturer's distributing company, distributor's exclusive territory right was a "property right" rather than a mere revocable agency without an interest, and hence contract

for sale thereof to manufacturer was valid. Civ.Code, §§ 655, 993.

4. Good will ⚡5

Where manufacturer and manufacturer's distributing company effected a purported purchase from local distributor of exclusive territory for sale of their products, allegedly believing that distributor had no vendible interest in the business and allegedly intending only to make a gift to distributor, there was a compromise of disputed claim which furnished adequate consideration for the sale.

5. Contracts ⚡68

The compromise of a claim asserted in good faith, of whose validity the parties entertain a doubt at the time, and about which there is a bona fide controversy, is a valuable consideration and will support a promise or contract.

6. Appeal and error ⚡931(4)

On appeal from judgment wherein trial court found that sale of exclusive trade territory was consummated, implied finding would be presumed that sale was not conditioned upon seller's refraining from conducting a competing business in such district, where there was evidence to support such implied finding.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action to recover purchase price of trade route by Frank Carey against the Kraft-Phenix Cheese Corporation and Kraft Associated Distributors, Inc. From a judgment for plaintiff, defendants appeal.

Affirmed.

Seth Millington, of Gridley, for appellants.

Ware & Ware, of Chico, for respondent.

Mr. Justice THOMPSON delivered the opinion of the Court.

The defendants have appealed from a judgment which was rendered against them for the agreed purchase price of an exclusive property right held by the plaintiff in a specific territory in which to buy and sell all Kraft products such as cheese, mayonnaise, etc.

The appellants contend that the agreement to purchase the territorial rights was conditional upon the plaintiff refraining from engaging in a competitive business

in that territory and that the offer to purchase the route is without consideration and void for the reason that plaintiff owned no property right which he could sell. The respondent asserts that he possessed property rights in the business which he had a lawful right to and did sell to the defendants and that even though he held but a doubtful property right the transaction and agreement to compromise the claim furnish a sufficient consideration upon which to enforce the purchase.

The Kraft-Phenix Cheese Corporation is engaged in manufacturing and selling its brands of cheese, mayonnaise, and similar products in California and elsewhere. The Kraft Associated Distributors, Inc., was engaged in marketing those commodities. About 1925 the plaintiff purchased for the sum of \$5,800 from V. R. Johnson, a private owner of territory, the exclusive right to purchase, sell, and distribute the Kraft products in the counties of Yolo, Yuba, Sutter, Butte, Glenn, Colusa, Tehama, and Shasta. That right was approved by the Kraft corporations. About two years later Mr. Carey sold the northerly portion of his district to his son-in-law, L. L. Broderick, for \$3,000. That sale was also approved by the defendants. No written contracts with the representatives of the Kraft companies were executed. There were some 25 or 30 different distributors of Kraft products in Northern California, each of whom possessed exclusive rights to his respective territory. These districts were not purchased from the Kraft companies. They were bought and sold by the owners independently of the Kraft companies, but the distributors' rights were recognized and approved by those companies. The uniform custom was to treat these districts as the property of the respective so-called distributors, who bought the Kraft products from the companies at agreed prices "less than wholesale prices therefor" and sold them to their personal customers at uniform prices fixed by the companies. When products were purchased from the companies by the distributors, the title to the goods vested in the distributors. There appears to have been no privilege of returning to the companies unsold products. The distributors furnished their own motor vehicles and equipment for conducting their businesses. Kraft signs were painted on the distributing machines by agreement of the respective parties. The distributors solicited and procured their own customers within their

respective districts. They were personally responsible for all sales of produce and the accounts of such sales belonged to the distributors. The Kraft companies had no property interest in such accounts. The Kraft organizations, however, did periodically send a representative through the districts to help the distributors to improve and increase their businesses and to see that their products were supplied in standard condition. These routes were recognized by the companies as the exclusive property of the distributors. At a convention of the distributors held in San Francisco in 1933, at which 25 or 30 representatives were present, Mr. Kraft, himself, told them they were the owners of their respective businesses in their several districts. Mr. Carey testified in that regard: "He said it was our business, and he recognized it as such." In 1935 the produce corporations decided to change their plan of distribution and to thereafter market their products through agents to be employed on fixed salaries. Pursuant to that plan they notified each distributor, including this plaintiff, to that effect. He and his son-in-law each received letters from the Kraft-Phenix Cheese Corporation dated May 22, 1935, reading in part: "It is our plan to buy the businesses of the majority of our distributors in northern California. * * * It has been our intention to get up to see you and Frank Carey. * * * (We) want you to set up a statement of your business so that when the time comes you will have everything in readiness and know exactly what your business is worth."

[1] It appears that the businesses of the several distributors consisted of exclusive rights to buy and sell the Kraft commodities in their own territories, the equipment possessed and used by them for that purpose, the Kraft commodities purchased by them which remained unsold, and the good will acquired by securing and serving their many customers throughout their districts. When the change in the plan of marketing goods was made, it appears that each distributor was paid by the defendants for his business, good will, and equipment a substantial consideration consisting of either cash or credit for debts which they owed the Kraft corporations for goods purchased. They paid Mr. Broderick, the son-in-law of plaintiff, the sum of \$2,400 for his business. The only two witnesses called in behalf of the defendants testified that the defendants paid the distributors possessing territory a consideration "for

the good-will of their business." The good will incident to a business constitutes a property right. Sections 655 and 993, Civ. Code.

For nearly ten years the plaintiff conducted his business of buying and selling Kraft products in his district. He had a large number of customers whom he regularly supplied. No complaint was made to him of the manner in which he conducted the business. His exclusive right to the territory cost him \$2,800 independently of the portion which he sold to his son-in-law. He bought a truck for \$3,150 which he used exclusively in that business on which he painted a sign advertising the Kraft productions. He also had other equipment of small value and a quantity of unsold goods which he had purchased from the defendants. At the time of the agreement to purchase his business he owed the defendants the sum of \$555.34. By request, pursuant to the letter from the corporation dated May 22, 1935, suggesting the purchase of their business, the plaintiff and his son-in-law met Mr. Parlett, the business manager of the Kraft corporations, July 27, 1935, at his office in San Francisco. Mr. Carey asked \$3,000, but was then offered \$2,000 for his business, including his truck, equipment, produce on hand, and good will. Mr. Broderick received \$2,400 for his business, including a truck of less value than that of the plaintiff. Broderick's equipment was worth about \$700. Broderick was employed and served as defendant's salesman at a salary of \$40 per week. Mr. Carey preferred to keep his truck, which the respective parties finally agreed was then worth \$500. He accepted the offer of a net sum of \$1,500 for the business and property, exclusive of the truck. As a part of the transaction an inventory of the Kraft products on hand was taken, and in part fulfillment of the transaction the goods were delivered to the defendants. Mr. Parlett offered to employ Carey as their salesman at a salary of \$35 per week, but the plaintiff told him he could not accept the employment as he planned to handle the Sheppard products, including what were called the "Grandma line" of cookies and cakes. It is contended the marketing of Sheppard products constituted a competing industry to that of the defendants.

Regarding the discussion at the time of the agreed purchase, with relation to plaintiff's plan to conduct a business in that district for the Sheppard products, there is

an absolute conflict of evidence. The following testimony was adduced:

"Q. Was there anything said about your future plans? A. They asked me what I was going to carry, and I said I was going to carry the Grandma's line, and other than that I did not know.

"Q. What is the Grandma line? A. It consists of cakes and cookies. * * *

"Q. Was there anything said as to whether or not you were to be restricted? A. No sir, it was never mentioned."

It will be observed the plaintiff proposed to conduct a future business for the Sheppard Company in that district for the distribution of "cakes and cookies" and possibly some other side line. It appears that the Kraft products consist chiefly of cheese and mayonnaise. We are directed to no evidence which indicates that plaintiff's proposed business competed in any way with that of the defendants' enterprise. Moreover, it does not appear that the plaintiff actually did thereafter engage in selling even the "Grandma line of cakes and cookies."

Both Carey and Broderick testified that the subject of plaintiff's future business was discussed, and that Parlett did not then suggest that fact would make any difference in their purchase of plaintiff's Kraft business. Mr. Parlett denies those statements. The court definitely found that the Kraft business was sold to the defendants for \$1,500 which they then agreed to pay. It was not found that sale was made subject to any condition. In effect, the court determined that plaintiff's refraining from conducting a similar business in that territory was not made a condition upon which the sale was consummated. The plaintiff assumed the sale was completed. He turned over to the defendants the Kraft products which he had on hand, and never thereafter sold Kraft goods in that or any other territory.

The purchase price of the business was not paid, and the plaintiff wrote to the defendants, demanding payment of \$1,500, less the amount he then owed them. October 14th the Kraft corporation replied, stating for the first time that, "it was our understanding this deal was entirely off * * * when you immediately entered into business with a competing line of merchandise within the same territory." In that letter the defendants specifically recognized that plaintiff had a property interest in the business which was subject to sale, but con-

tend that the good will of the business was destroyed by plaintiff's conducting a competing business in that district. There is no evidence to that effect. The court found that the sale was made with full knowledge that the plaintiff was going to engage in the business of selling the "Grandma line of cakes and cookies," and that he told them that was the reason he could not accept employment with them as a salesman. The findings were all adverse to the defendants. Judgment was rendered in favor of the plaintiff for the purchase price of his Kraft business, less the sum of \$555.34, which he then owed them for products which had been previously purchased. From that judgment the defendants have appealed.

The validity of the judgment in this case depends upon the questions as to whether the plaintiff possessed a property interest in the Kraft business which he conducted in his district which was subject to sale, and whether there was a consideration for that sale. The appellants contend plaintiff held no property interest which is susceptible of sale and conveyance. For that assertion, they rely on the principle announced in the newspaper route cases of *Boehm v. Spreckels*, 183 Cal. 239, 191 P. 5, and *Otten v. Spreckels*, 183 Cal. 252, 191 P. 11, together with other similar cases in other jurisdictions.

[2] In spite of the conflict of evidence in this case regarding the terms of the sale, we are of the opinion there is adequate proof to support the findings that the plaintiff's business in his district was purchased by the defendants for a specified price, which was not paid, but is still due and owing.

The newspaper route cases above referred to are not authorities applicable to the facts of this case determining that this plaintiff was possessed of no property interest in his business of buying and selling Kraft products in his district which is susceptible of sale and transfer. The *Boehm* and *Otten* Cases are vitally different from the present cause. Those cases were suits for damages for the revocation of clear agencies created by contracts between the owner of the San Francisco Call and the respective plaintiffs to deliver that newspaper to the subscribers thereof. *Boehm* and *Otten* purchased their agencies directly from their principal, the owner of the newspaper, for a consideration. Their contracts provided that they were to serve

the principal for its sole interest by distributing to its subscribers in specified districts the newspapers. Those agents acquired no property rights in the newspapers which they delivered. The newspapers which they delivered to the customers of their principal were not owned by the agents. The agents merely collected from the subscribers a sum specified by the owner. The collections from the customers were made for the benefit of the owner. All the interest which the agents possessed in the money collected from subscribers was to retain therefrom their agreed commissions for delivering the newspapers. The court held that those transactions created agencies under section 2295 of the Civil Code which were subject to revocation pursuant to sections 2355 and 2356 of the same Code for the reason that the mere right of the agents to retain agreed commissions for their personal services from the subscription prices collected by them did not create property rights "coupled with an interest" in the newspaper business. The court specifically held in those cases that no sales of newspapers were made to the agents, that they held no title to the property which they handled, and that they merely acted as the agents of the owner of the newspaper. The court bases its opinions in those cases on that precise state of facts. It is said in the *Boehm* Case in that regard, at pages 245 and 246 of 183 Cal., 191 P. 5, 8:

"The fact would appear to be that the papers were sold by Spreckels to the subscribers. That was the condition when the contract was made, and there is nothing in the contract to indicate that it was to effect a change in the relations between the publisher and the subscribers. The agreement of Spreckels is that he will 'deliver' to Shepherd [a former owner of the route], 'a sufficient number of issues of said newspaper to supply said route.' In view of the fact that Spreckels had already agreed to sell and deliver the papers to the subscribers, this language cannot reasonably be construed to import a sale of the same copies to Shepherd. * * *

"The more reasonable conclusion, in view of all the facts, is that it is only a rather awkward expression of the idea that Shepherd was to have the right and duty, as agent of Spreckels, of delivering the papers, soliciting and taking new subscriptions thereto, and conducting the business incidental thereto within the territory de-

scribed, including the collection of the price of the subscriptions owing to Spreckels. The statements that Shepherd was to receive the papers, distribute them within the territory, and 'manage, conduct and control said newspaper route in such manner and with such efficiency as shall be for the best interests' of said newspaper, 'and as shall maintain and preserve the extent and value of said newspaper route to the satisfaction of' Spreckels, are apt expressions to describe the duties and powers of an agent. They strongly imply that an agency only was contemplated. They are meaningless as applied to a sale of the business, or a part thereof, to the carrier. For these reasons we conclude that the contract created an agency and did not declare a sale of property."

[3] In the present case, upon the contrary, the evidence is undisputed that this plaintiff purchased his territory from a stranger to the defendants for a valuable consideration; that plaintiff personally secured his own customers for the Kraft products; that he bought the Kraft goods outright, to which title was transferred to him; and that he sold them to his own customers on his own responsibility; that he paid the defendants for their goods whether he was able to resell them or not; that the accounts with his customers belonged to him, and the defendants had no interest in such claims; that the plaintiff was not employed by the defendants as their agent, and did not pay him a mere commission for his services; that plaintiff purchased and owned a truck, certain equipment, and a quantity of goods on hand, together with the exclusive right to a specific territory, which constituted his own business which he had a right to sell and convey independently of the defendants. He was not a mere agent of the defendants without an interest coupled with that particular business.

It is true that the Kraft corporations did assume to maintain a general supervision over the distribution of their products to improve the service and satisfy the customers. It does not appear the defendants had any right to dictate to the plaintiff what customers he should supply, or the time or manner of his deliveries of goods. Nor did they have any control over his customers. It does appear the defendants approved his purchase of the route, and did for nine years sell and deliver to him large quantities of their products, which he re-

sold to his own customers. It may also be true that the defendants might refuse to sell goods to another person to whom the plaintiff might sell his business. But that does not affect the property rights to the business which he owned and controlled to a large extent.

We are therefore of the opinion the plaintiff in this case was not a mere agent of the defendants, which agency was subject to revocation, but, on the contrary, it appears that he held title to a property interest in the business of buying and selling Kraft products, which he had a right to sell and convey. The plaintiff therefore was entitled to maintain this action for the agreed purchase price of his business.

[4] Regardless of whether plaintiff actually held title to the business which was susceptible of sale and transfer, he honestly believed that he possessed that title to property and in good faith negotiated to sell it to the defendants for \$1,500 on that theory. Evidently the defendants also assumed that he owned a property interest in the business which he had a right to sell. They bought similar interests for substantial sums from other distributors. They dealt with the plaintiff as though they believed he had an interest susceptible of sale. They told him in the letter dated May 22, 1935, it was their "plan to buy the business," and they requested him to prepare a statement of his business so that they might know "exactly what your business is worth." But even though defendants secretly thought plaintiff had no interest in a business which he had a right to sell, and that their offer of \$1,500 merely amounted to a gift, the transaction would then become a compromise of a disputed claim which furnished adequate consideration for the sale. The statement of law applicable to such a situation, which appears in 1 Elliott on Contracts, page 417, § 237, is supported by a uniform line of authorities, as follows:

[5] "The compromise of a claim which is asserted in good faith and of the validity of which the parties at the time entertain a doubt, and about which there is a bona fide controversy, is a valuable consideration and will support a promise or a contract."

To the same effect are the following authorities: *Randisi v. Simone*, 26 Cal.App. 661, 147 P. 1176; *Fairchild v. Cartwright*, 39 Cal.App. 118, 178 P. 333; *Bennett v.*

Bennett, 219 Cal. 153, 159, 25 P.2d 426; Gardner v. Watson, 170 Cal. 570, 575, 150 P. 994; 6 Cal.Jur. 175, § 120.

[6] The question as to whether the sale depended upon the plaintiff's refraining from conducting a competing business in that district must be resolved against the appellants for the reason that the court found that the sale was consummated, and the inference is that no such condition attached to the transaction. There is evidence to support that implied finding.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



24 Cal.App.2d 538

PEOPLE v. GOODSELL et al. (KRINSK et al., Interveners).

Civ. 10349.

District Court of Appeal, First District,
Division 2, California.

Jan. 25, 1938.

Hearing Denied by Supreme Court
March 25, 1938.

1. Eminent domain ⇨254

Where landowner whose property had been taken in eminent domain proceeding, after recovering general verdict which pursuant to court's instruction did not include interest, filed written consent to reduction of preliminary judgment and accepted clerk's warrant in amount of judgment, with interest from date of judgment only, landowner thereby waived her right to appeal on ground of court's failure to award interest from date of transfer of possession, notwithstanding statute providing that acceptance of payment should not constitute waiver of claim for greater compensation. Code Civ.Proc. § 1254.

2. Appeal and error ⇨162(1)

Where party consents to and acquiesces in a judgment as entered, and thereafter accepts and retains the fruits of the judgment, which would not have been entered but for his acquiescence, he may not attack that judgment on appeal.

3. Eminent domain ⇨254

The statutory provision that acceptance of award in condemnation proceedings is not a waiver of claim for greater compensation

does not affect rule that acquiescence in judgment and acceptance of fruits thereof waives right of appeal, where judgment as a whole is entered by consent. Code Civ. Proc. § 1254.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Eminent domain proceeding by the People of the State of California, acting by and through the Department of Public Works and California Toll Bridge Authority, against Mildred Livingston Goodsell, etc., and others, wherein Arnold Krinsk and Anna Krinsk intervened. From that part of the judgment which failed to order payment of interest, defendant appeals.

Affirmed.

Hearing denied by Supreme Court; HOUSER, J., dissenting.

Long & Levit, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Heller, Ehrman, White & McAuliffe, of San Francisco, for the People.

NOURSE, Presiding Justice.

Plaintiff sued in eminent domain and took possession of the property on August 10, 1934, under an order of court made therefor in accordance with the provisions of section 1254 of the Code of Civil Procedure. Trial by jury on the question of damages was commenced on the 24th of October, 1935, and concluded on the 27th of November, 1935. For the purpose of fixing damages the jury was instructed to determine the market value of the property as of the date of the trial, and that it should not include interest therein. A verdict was duly returned in the sum of \$42,500, and findings of fact and conclusions of law were thereafter made and entered by the trial judge. Upon the presentation of the proposed findings and conclusions of law, the parties stipulated in open court that no claim of interest on the award would be made for the period prior to the 10th day of August, 1934, but the defendant then contended that she was entitled to interest at the legal rate on the amount of the award from and after that date, this being the date upon which the plaintiff entered into possession under the order of the court. The trial court at that time ruled that the defendant was not entitled to interest upon the amount of the award from any period prior to the entry of judgment, and thereupon signed the

findings and filed its preliminary order and judgment of condemnation. Thereafter the plaintiff moved for a new trial, and, after argument thereon, an order was made that a new trial would be granted on the grounds of the insufficiency of evidence to justify the verdict and that the damages were excessive unless the defendant would consent to a reduction of the judgment to the sum of \$34,242, in which event the said motion for a new trial would be denied. The defendant filed a written consent to the reduction of the preliminary order and judgment from the sum of \$42,500 to the sum of \$34,242. Thereupon the trial court entered its order amending the preliminary judgment by changing its figures indicating the amount of the award but at the same time stipulated that all the remaining provisions of said judgment should be deemed to be in full force. After the entry of this order the plaintiff paid to the clerk of the court the aggregate sum of \$35,000 as security for the payment of compensation to the defendant. This order was followed by another directing the clerk of the court to issue its warrant in the amount of \$34,742.26, the amount of the award as amended with interest from the date of the judgment, and this sum was paid to defendant and received and accepted by her from the clerk of the court. Thereupon the defendant gave notice of appeal from that part of the judgment which failed to order the payment of interest to her from and after the date upon which plaintiff took possession of the property.

Appellant's brief is devoted to an argument to the point that under the due process of law provisions of the Constitution she could not be deprived of her right to possession of her property without due compensation, and that such compensation required payment of interest on the amount of the award from the date of the transfer of possession. The appellant makes a plausible and able argument in support of her position, but we refrain from expressing any view as to its merit because any such expression would be obiter dicta in view of what follows.

[1-3] The respondent contends that the judgment must be affirmed because it was entered only upon the express consent of the appellant. It is unnecessary to restate the facts leading up to the entry of the final judgment. Reference thereto discloses that the matter of interest from the date of entry into possession of the premises was expressly withdrawn from the consideration of the jury, and that at the time of the settlement of the findings of fact the trial court expressly stated that no interest would be allowed on the amount of the verdict prior to the entry of the judgment. When thereafter the court directed that a new trial should be granted unless the defendant should consent to a reduction of the judgment, it must have been in the minds of all parties that that judgment likewise would not include any item of interest. If interest were allowable from the date of possession, it would have been an integral part of the judgment entered after the order denying a new trial. But the trial court made it plain at the time that no interest was to be included; that the sum of \$34,242 was to be the full amount of the judgment. There is here no question of surprise or misunderstanding on the part of anyone concerned. When, therefore, the defendant consented to accept a judgment in that specific sum, she must be deemed to have waived her claim for interest. *Conlin v. Southern Pacific Railroad Co.*, 40 Cal.App. 743, 747, 182 P. 71. It is an accepted rule that, when a party consents to and acquiesces in a judgment as entered, and thereafter accepts and retains the fruits of the judgment, which would not have been entered but for his acquiescence, he may not attack that judgment on appeal. Section 1254 of the Code of Civil Procedure qualifies this statement to the extent that acceptance of the award in condemnation proceedings is not a waiver of a claim for greater compensation, but this does not affect the rule or the principle when the judgment as a whole is entered by consent.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

24 Cal.App.2d 438

PEOPLE v. MACK.

Cr. 3043.

District Court of Appeal, Second District,
Division 2, California.

Jan. 19, 1938.

1. Infants ☞20

Evidence held to sustain conviction for commission of immoral acts against eight year old child. Pen.Code, § 288a.

2. Criminal law ☞1172(7)

In prosecution for commission of immoral act against eight year old child, instruction relative to law of accomplices informing jury of difference between consent and submission of victim and giving jury duty to determine whether complaining witness was capable of understanding nature and quality of act and of making decision concerning the act was not prejudicial to accused. Pen.Code, §§ 26, 288a.

3. Criminal law ☞507(7)

In prosecution for commission of immoral act against eight year old child, in absence of evidence showing knowledge of the child of wrongfulness of the acts to which she submitted, child was not an "accomplice." Pen.Code, §§ 26, 288a.

[Ed. Note.—For other definitions of "Accomplice," see Words & Phrases.]

4. Witnesses ☞277(2)

In prosecution for commission of immoral acts against eight year old child, where accused on direct examination stated that child came to shop where he worked and remained for five minutes during which time he conversed with her, cross-examination whether accused asked child if her parents were looking for her was proper. Pen. Code, § 288a.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Edgar F. C. Mack was convicted of violation of section 288a of the Penal Code, and he appeals.

Affirmed.

Theodore Robinson, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

WOOD, Justice.

Defendant was convicted of the crime of violation of section 288a of the Penal Code. He appeals from the judgment and from the order denying his motion for a new trial.

[1] The crime was committed upon the body of a girl of the age of eight years. A statement of the details of the crime would be inappropriate. The child related the acts of the defendant in definite and clear language. Her testimony and the proof of certain circumstances shown in evidence are amply sufficient to sustain the conviction.

[2,3] Defendant complains of a number of instructions given to the jury by the trial court. For the most part these instructions are those commonly given in criminal cases and have been approved many times by the reviewing courts. Defendant complains in particular of an instruction concerning the law of accomplices. The court gave a lengthy instruction on this subject in which the jury was informed of the difference between consent and submission on the part of the victim and in which the jury was told that it was their duty to determine whether or not the complaining witness was capable of understanding the nature and quality of the act and of making a decision consenting to the act. Defendant was not prejudiced by the giving of the instruction in question. Section 26 of the Penal Code provides that children under the age of fourteen are incapable of committing crimes, "in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness." An examination of the record discloses that there was no proof of knowledge on the part of the child of the wrongfulness of the act to which she submitted. It cannot be held that she was an accomplice. Such was the ruling in *People v. Becker*, 140 Cal.App. 162, 35 P.2d 196, a case in which the child was eleven years of age.

[4] Defendant also complains of certain rulings of the trial court given upon cross-examination of defendant. In his direct examination defendant stated that the child had come to the shop where he worked and remained there about five minutes, during which time he carried on a conversation with her. On cross-examination he was asked the question, "Did you ask Jean if her folks were looking for

her?" and answered, "No." He was then asked the question, "Isn't it a fact that on that same afternoon you were taken to the police station, you talked to Manchester and Taylor in the Detective Bureau at the police station and told them that you asked Jean if her folks were looking for her," and answered, "I don't remember that." In view of the nature of the charge and of the circumstances under which it was alleged to have been committed it was proper for the prosecutor to ask on cross-examination if defendant had not asked the child if her folks were looking for her. In view of his negative answer, it was proper for the prosecutor to ask if he had not so informed the officers who had arrested him. The cross-examination bore upon a subject concerning which defendant had testified upon his direct examination. An examination of the record discloses that other rulings of the trial court upon the admission of testimony, of which complaint is made, were not prejudicial to the rights of defendant.

The judgment and order are affirmed.

We concur: CRAIN, P. J.; McCOMB, J.



24 Cal.App.2d 453

**PHILLIPS v. MUNICIPAL COURT OF
LOS ANGELES et al.**

Civ. 11645.

District Court of Appeal, Second District,
Division 2, California.

Jan. 19, 1938.

Hearing Denied by Supreme Court
March 17, 1938.

1. Vagrancy ☞1

As used in statute, punishing as vagrant any person who "loiters" about school or public place, the verb "loiter" has a well-recognized meaning in ordinary use, and means to linger idly by the way, to idle. Pen.Code § 647a, as added by St.1929, p. 697.

[Ed. Note.—For other definitions of "Loiter; Loitering," see Words & Phrases.]

2. Constitutional law ☞258

The statute penalizing as a vagrant any person "who loiters about any school or public place at or near which school children attend" is constitutional in view of

Legislature's power to protect school children, as against contention that statute is ambiguous, uncertain, and unintelligible. Pen.Code, § 647a, as added by St.1929, p. 697.

3. Statutes ☞181(2)

Courts will construe general statutes reasonably, and not in a manner that will lead to unjust or absurd results.

4. Constitutional law ☞81

Innocent acts may be prohibited by statutes enacted under the police power when necessary to protect public peace, safety, and welfare.

5. Statutes ☞118(6)

The title, "an act to add a new section to the Penal Code * * * relating to vagrancy," for statute punishing as vagrant any person who annoys or molests school child or loiters about school or public place, complied with constitutional requirement that subject of an act be expressed in its title. Pen.Code, § 647a, as added by St.1929, p. 697; Const. art. 4, § 24.

6. Statutes ☞105(1)

The constitutional requirement that subject of an act be expressed in its title must be liberally construed, and requires only a reasonably intelligent reference to the subject to which the legislation is to be addressed. Const. art. 4, § 24.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, B. Rey Schauer, and Clement L. Shinn, Judges.

Proceeding by Michael Phillips against the Municipal Court, City of Los Angeles, County of Los Angeles, State of California, and Honorable Harold B. Landreth, Judge thereof, to prohibit respondents from enforcing a penal statute against petitioner. From an order in favor of petitioner, respondents appeal.

Reversed.

Hearing denied by Supreme Court; HOUSER, J., dissenting.

Ray L. Chesebro, City Atty., Newton J. Kendall, Asst. City Atty., and John L. Bland and George William Adams, Deputy City Attys., all of Los Angeles, for appellant.

Joe Wapner, of Los Angeles, for respondent.

CRAIN, Presiding Justice.

This is an appeal by the defendants from an order of the superior court prohibiting

them from enforcing against the petitioner section 647a of the Penal Code, which reads as follows: "Every person who annoys or molests any school child or who loiters about any school or public place at or near which school children attend, is a vagrant, and is punishable by a fine of not exceeding five hundred dollars or by imprisonment in the county jail for not exceeding six months, or by both such fine and imprisonment."

The petitioner makes two contentions: (1) The second clause of said section is so vague, indefinite, ambiguous, uncertain, and unintelligible as to contravene both the State and Federal Constitutions, and therefore is invalid. (2) The title to the act, St.1929, p. 697, adding said section to the Penal Code, is insufficient.

[1] The first contention of the petitioner is untenable. The verb "loiter" means "to linger idly by the way, to idle." As was said in the case of *Robinson v. State*, 15 Ala.App. 29, 72 So. 592, "'Loitering' is a term having a well-recognized meaning in ordinary use, the collective acts constituting which all persons are familiar with." As was said in the case of *Ex parte Strittmatter*, 58 Tex.Cr.R. 156, 124 S.W. 906, 907, 137 Am.St.Rep. 937, 21 Ann.Cas. 477, "We think the terms 'loiter, loaf, and idle' are wholly at variance with the occasional or even frequent presence at such public places by deserving persons who may be for the time being unemployed. It is difficult in matters of this sort by any language which the Legislature could have employed to have laid down a rule so definite and precise as not to be the subject-matter of criticism. In constructive legislation of this sort, along new lines, some difficulty will be found in so framing the definition as not by a strained construction, or even, perhaps, by a literal construction, to place improper and grievous burdens on deserving persons."

[2] It is urged that it is unreasonable to compel all persons to forego the pleasure of loitering about any school or public place at or near which school children attend merely because some persons of evil disposition desire to do so. It will be observed that the law does not attempt to entirely prohibit loitering, but that it confines its prohibitions to loitering about any school or public place at or near which school children attend. However, the mere fact that some innocent people may desire to loiter near a public school does not de-

prive the Legislature of its power to prohibit loitering at such a place if the safety of school children require such legislative action. *Booth v. Illinois*, 184 U.S. 425, 22 S.Ct. 425, 46 L.Ed. 623; *Purity Extract, etc., Co. v. Lynch*, 226 U.S. 192, 33 S.Ct. 44, 57 L.Ed. 184; *Otis & Gassman v. Parker*, 187 U.S. 606, 23 S.Ct. 168, 47 L.Ed. 323.

[3,4] The courts will construe general statutes reasonably and not in a manner that will lead to unjust or absurd results. *Church of Holy Trinity v. United States*, 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226; *United States v. Kirby*, 74 U.S. 482, 7 Wall. 482, 19 L.Ed. 278; *State v. Jackson*, 71 N.H. 552, 53 A. 1021, 60 L.R.A. 739. Innocent acts may be prohibited by statutes enacted under the police power when necessary to protect the public peace, safety, and welfare. If the Constitution guarantees to the petitioner the right to loiter, it certainly does not guarantee to him the right to do his loitering in places where promiscuous loitering may endanger the peace and safety of our school children on account of the immoral desires of some who may exercise such right. *Pacific States, etc., Co. v. White*, 296 U.S. 176, 56 S.Ct. 159, 80 L.Ed. 138, 101 A.L.R. 853; *Thomas v. Indianapolis*, 195 Ind. 440, 145 N.E. 550, 35 A.L.R. 1194; *Fitts v. Atlanta*, 121 Ga. 567, 49 S.E. 793, 67 L.R.A. 803, 104 Am.St.Rep. 167.

[5,6] The contention that the title of the act is insufficient is without merit. The title to the act reads as follows: "An act to add a new section to the Penal Code, to be numbered 647a, relating to vagrancy." St.1929, p. 697. The constitutional provision, article 4, § 24, requiring the subject of the act to be expressed in its title must be liberally construed, and all that is required to be contained therein to meet the constitutional requirement is a reasonably intelligent reference to the subject to which the legislation is to be addressed. *Estate of Wellings*, 192 Cal. 506, 519, 221 P. 628; *Matter of Maginnis*, 162 Cal. 200, 121 P. 723; *Frank v. Maguire*, 201 Cal. 414, 257 P. 515; *Heron v. Riley*, 209 Cal. 507, 289 P. 160; *People v. Fryer*, 175 Cal. 785, 167 P. 382.

Order reversed.

I concur: WOOD, J.

McCOMB, Justice.

I dissent. In my opinion section 647a of the Penal Code attempts to make actions

inherently innocuous, public offenses, an attempt that may not be successful. *Territory of Hawaii v. Anduha*, 1931, 9 Cir., 48 F.2d 171. As I view the instant case the holding in the majority opinion is contrary to the rule of law indicated by Mr. Chief Justice Beatty in the case of *Matter of Williams*, 158 Cal. 550, 111 P. 1035, and is in conflict with the law as announced by the District Court of Appeal in the recent case of *In re Harder*, 9 Cal.App.2d 153, 49 P.2d 304.



24 Cal.App.2d 499

GUYER v. PACIFIC ELECTRIC RY. CO.
et al.

Civ. 11592.

District Court of Appeal, Second District,
Division 2, California.

Jan. 22, 1938.

Hearing Denied by Supreme Court
March 21, 1938.

1. Appeal and error ⇨927(3)

The evidence must be viewed most favorably to plaintiff in reviewing judgment predicated upon motion for a nonsuit.

2. Railroads ⇨348(6)

Where physical facts shown by undisputed evidence raise inevitable inference that motorist approaching railroad crossing did not look or listen, or that, having looked or listened, he endeavored to cross immediately in front of a rapidly approaching train which is plainly open to view, motorist is as a matter of law guilty of contributory negligence.

3. Railroads ⇨327(2), 333(1)

Motorist who had unobstructed view of electric train as train approached highway intersection and whose automobile was struck by train was guilty of contributory negligence as matter of law, whether motorist did not look or listen or whether he failed to heed approaching train and endeavored to cross tracks in front of train.

4. Negligence ⇨83

Elements of "last clear chance" doctrine are plaintiff's inability to escape danger resulting from his own negligence, awareness of the danger by defendant who has last clear chance to avoid the injury by ordinary care, and failure of defendant to avoid the injury.

[Ed. Note.—For other definitions of "Last Clear Chance," see Words & Phrases.]

5. Railroads ⇨338

Where motorman on electric train with which automobile collided at unobstructed crossing applied emergency brakes to train as soon as he observed approaching motorist, continued to ring the bell, and did all in his power to avoid the collision, the "last clear chance" doctrine was not applicable.

6. Appeal and error ⇨205

District Court of Appeal would not review trial court's action in sustaining objection to questions propounded to photographer, where there was no offer of proof made and questions did not indicate that answers would be material or beneficial to plaintiff.

7. Railroads ⇨347(9)

In action for death of motorist whose automobile collided with train, testimony of witness that wind was so strong at time of accident that witness could not hear train whistle was not material.

8. Evidence ⇨527

In action for death of motorist whose automobile collided with train, witness' testimony that wind was so strong at time of accident that witness could not hear train whistle was not admissible as testimony of an expert, since subject of inquiry was not proper one for expert testimony.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Armour Ralph Guyer against the Pacific Electric Railway Company and another for the wrongful death of one Ralph Guyer, which resulted from injuries sustained in an automobile collision with named defendant's electric train. From an adverse judgment, the plaintiff appeals.

Affirmed.

William C. Ring and Bernard E. Hill, both of Los Angeles, for appellant.

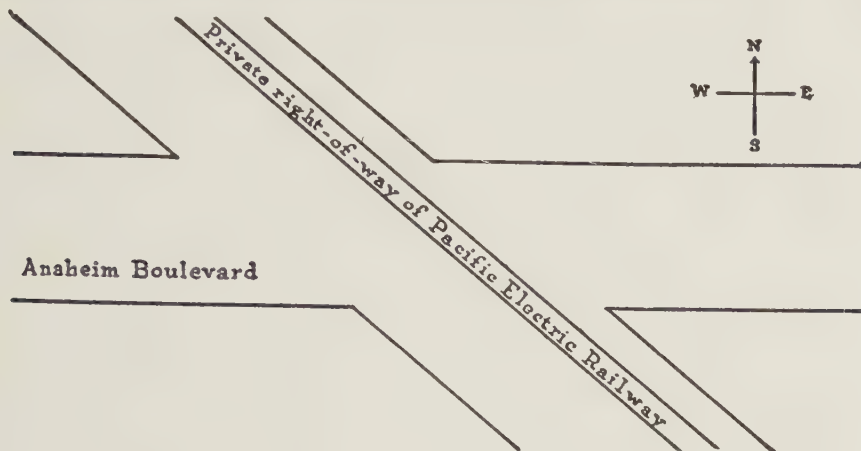
Frank Karr, E. E. Morris, C. W. Cornell, and O. O. Collins, all of Los Angeles, for respondents.

McCOMB, Justice.

Plaintiff appeals from a judgment in favor of defendants after the trial court granted the defendants' motion for a nonsuit in an action to recover damages for the wrongful death of Ralph Guyer. Plaintiff is decedent's only heir at law.

[1] Viewing the evidence most favorable to plaintiff, as we must in reviewing a judgment predicated upon a motion for a nonsuit (*Montgomery v. Nelson*, 211 Cal. 497, 499, 295 P. 1034), the material facts are these:

Diagram of the Intersection where the Accident Hereinafter Described Occurred



September 11, 1935, about 4:45 p. m., defendant corporation was operating an electric train with defendant Brown as motorman. The train was moving in a southeasterly direction on the track just northwest of the point where the right of way crosses Anaheim boulevard in the city of Long Beach, Cal. The boulevard at this point runs east and west. Waiting for the train to pass was a car stopped just east of the intersection on the north side of the street. Also stopped and waiting for the train to pass were several cars on the south side of the boulevard just southwest of the crossing.

For approximately 1,000 feet prior to reaching the northerly line of Anaheim boulevard defendant Brown had been sounding the whistle on the train by blowing two long and two short blasts. At the same time there were oscillating at the intersection on both sides of the track two red circular wigwags containing illuminated red lights in the center thereof, and the bells attached to the wigwags were ringing.

A few feet prior to entering Anaheim boulevard defendant Brown observed an automobile about 150 feet east of the tracks on Anaheim boulevard traveling in a westerly direction about 30 miles per hour, which was being operated by Dr. Guyer. Defendant Brown immediately applied the emergency brakes to the train. Meanwhile Dr. Guyer's automobile continued in a westerly

direction and passed to the left of the car stopped on the north side of the highway. About 15 feet from the crossing he applied the brakes to his car and turned to the southwest in front of the approaching train, the right front of which collided

with the right rear of Dr. Guyer's car. As a result he received personal injuries, from which he died.

From the point on Anaheim boulevard where Dr. Guyer's car was when first seen by defendant Brown, Dr. Guyer could have observed a train approaching from the northwest at least 1,000 feet away.

These are the questions presented for determination:

First: Was Dr. Guyer guilty of contributory negligence as a matter of law, in view of the facts stated above?

Second: Was the doctrine of last clear chance applicable under the foregoing statement of facts?

Third: Did the trial court err in:

- (a) *Sustaining an objection to questions propounded to a photographer as to*
 - (1) *whether a camera would reproduce objects not visible to the human eye, and*
 - (2) *what the customary prevailing winds at the scene of the accident were?*
- (b) *Striking from evidence witness Sykes' testimony to the effect that at the time of the accident the wind "was so strong that I couldn't even hear the whistle myself"?*

[2] The first question must be answered in the affirmative. It is the settled law

of this state that, if the physical facts shown by undisputed evidence raise the inevitable inference that a person approaching a railroad crossing did not look or listen, or that, having looked or listened, he endeavored to cross immediately in front of a rapidly approaching train which is plainly open to view, he is as a matter of law guilty of contributory negligence. *New York Lub. Oil Co. v. United Railroads*, 191 Cal. 96, 101, 215 P. 72; *Locke v. Los Angeles Ry. Corp.*, 10 Cal.App.2d 478, 480, 51 P.2d 1111; *Rasmussen v. Fresno Traction Co.*, 138 Cal.App. 540, 547, 32 P.2d 1091; *Martz v. Pacific Electric Ry. Co.*, 31 Cal.App. 592, 597, 161 P. 16.

[3] Applying the foregoing rule to the facts of the instant case, it is evident from the undisputed physical facts that Dr. Guyer had an unobstructed view of defendant's train as it approached the intersection and that either he did not look or listen or, having looked, failed to heed the rapidly approaching train and endeavored to cross immediately in front of it. In either event he was guilty of contributory negligence as a matter of law.

[4] The second question must be answered in the negative. The law is settled in California that the following elements must be present in order to bring the doctrine of last clear chance into operation (*Palmer v. Tschudy*, 191 Cal. 696, 700, 218 P. 36):

(1) Plaintiff has been negligent.

(2) As a result of plaintiff's negligence he is in a situation of danger from which he cannot escape by the exercise of ordinary care.

(3) Defendant is aware of plaintiff's dangerous situation and realizes, or ought to realize, plaintiff's inability to escape therefrom.

(4) Defendant then has a clear chance to avoid injuring plaintiff by the exercise of ordinary care and fails to do so. *Darling v. Pacific Elec. Ry. Co.*, 197 Cal. 702, 707, 242 P. 703; *Erwin v. Morris*, 10 Cal.App.2d 168, 170, 51 P.2d 149; *Choquette v. Key System Transit Co.*, 118 Cal.App. 643, 657, 5 P.2d 921.

[5] The uncontradicted testimony shows that defendant Brown immediately upon ob-

serving Dr. Guyer's automobile applied the emergency brakes to the train he was operating, continued to ring his bell, and did all in his power to avoid the unfortunate accident. It is therefore evident that the elements of the doctrine of last clear chance set forth in paragraph (4) above are absent from this case. Defendants neither had a clear chance to avoid injuring Dr. Guyer subsequent to learning his position of danger nor did they fail to avoid the accident by not using ordinary care.

[6] We will not consider the problem presented in paragraph (a) of the third question for the reason that it is the established law of this jurisdiction that, where a question to which an objection is sustained does not itself indicate that the answer to it will be favorable to the party seeking to introduce the testimony, before the ruling will be reviewed on appeal by an appellate court, an offer of what is proposed to be proven must first be made to the trial court so that the reviewing court can determine whether the proposed evidence would have been material and beneficial to the party offering it. *Newman v. Sunde*, Cal.App., 73 P.2d 260; *Abrams v. Hubert*, 10 Cal. App.2d 404, 407, 51 P.2d 884. In the present case the question did not indicate that the answer would be either material or beneficial to plaintiff nor was any offer of proof made.

[7, 8] The trial court's ruling in striking from evidence the testimony set forth in paragraph (b) of the third question, supra, was correct. There was no showing that witness Sykes had the same faculties for hearing as the deceased. Also in the present case it was entirely immaterial whether witness Sykes heard the warning signal. The question at issue was whether deceased heard the warning signals or not. Therefore the testimony was properly excluded as not being material to the case nor was the testimony admissible as being that of an expert witness, since the subject of inquiry was not a proper one for expert testimony.

For the foregoing reasons the judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

24 Cal.App.2d 440

A. PALADINI, Inc., v. DURCHMAN.
Civ. 5916.

District Court of Appeal, Third District,
California.

Jan. 19, 1938.

1. Shipping Ⓒ32

Where owner of boat delivered bill of sale thereof to creditor, making contemporaneous oral agreement that creditor might take possession of boat upon default in payment of debt, and after default owner again agreed that creditor might take possession of boat in event of subsequent default, in consideration of creditor making further advances of supplies, creditor was not guilty of conversion by taking possession of boat, placing boat in its fishing service, or renting boat to others, since subsequent agreement authorized change of possession under statute, despite invalidity of original agreement for change of possession. Civ. Code, § 2927.

2. Appeal and error Ⓒ1195(3)

A Supreme Court decision in action for possession of boat, that bill of sale of boat was in reality a mortgage and that contemporaneous oral agreement whereby mortgagee might take possession of boat upon default was invalid, which remanded action for new trial on theory that bill of sale was a mortgage, did not preclude court from entering judgment of foreclosure recognizing validity of subsequent oral agreement, testified to at second trial, whereby mortgagee took possession. Civ. Code, § 2927.

3. Chattel mortgages Ⓒ162

The statute governing chattel mortgagee's right to possession does not limit parties' right to enforce agreement, made subsequently to execution of mortgage, for transfer of possession to mortgagee upon default. Civ. Code, § 2927.

4. Appeal and error Ⓒ1195(4)

The Supreme Court's decision on first appeal of case does not necessarily become law of the case on second trial, where there is substantial difference between facts shown upon second trial and evidence offered on first trial.

5. Appeal and error Ⓒ173(2)

On appeal from judgment foreclosing chattel mortgage and recognizing mortgagee's right to take possession, objection that mortgagee did not sell mortgaged property

within a reasonable time was not reviewable, where question was not raised by pleadings nor on trial, and records did not show that mortgagor demanded return of boat or offered to pay indebtedness.

6. Shipping Ⓒ32

Where owner of boat executed bill of sale thereof to creditor, under circumstances rendering bill of sale in effect a mortgage, and subsequently agreed that mortgagee might take possession in event of default, mortgagee did not waive its lien or right to foreclosure by taking possession of boat pursuant to agreement.

7. Appeal and error Ⓒ673(2)

On appeal from judgment foreclosing mortgage on boat, where record did not show testimony supporting mortgagor's claim for damages for conversion, and mortgagor's allegations of damages in pleadings were general, reviewing court would not consider such claim.

Appeal from Superior Court, Humboldt County; Warren V. Tryon, J.

Action by A. Paladini, Inc., against William Durchman, to recover the possession or value of a certain fishing boat. From a judgment for plaintiff, directing foreclosure and sale of the boat, defendant appeals.

Affirmed.

H. C. Nelson, of Eureka, for appellant.
Daniel W. Hone, of San Francisco, and
E. S. Mitchell, of Eureka, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon appeal from a judgment awarding plaintiff the amount claimed to be due from the defendant by reason of advances made relative to the equipment of a certain fishing boat, and directing foreclosure and sale of the boat in question to repay the plaintiff for its advancements.

This cause was once tried on the theory that the plaintiff was the owner of the boat in question by reason of the execution and delivery by the defendant to the plaintiff of a bill of sale and an oral promise immediately thereafter that the plaintiff might take possession of said boat if the defendant defaulted in any particular relative to making the payment of the sums advanced by the plaintiff. This payment was

to be made by the delivery of fish as caught by the defendant.

Upon appeal to the Supreme Court it was held that the bill of sale was a mortgage and did not transfer title, and under the bill of sale the claim of possession to the boat as transferring title could not be sustained. *Paladini, Inc. v. Durchman*, 216 Cal. 212, 13 P.2d 731. The cause was remanded by the Supreme Court for the purpose of permitting amendments of pleadings and the introduction of additional evidence, if any, in the trial of a cause upon the theory that the bill of sale was a mortgage.

The record shows that in 1926, the defendant had purchased a boat, but which boat was not supplied with any engine or the equipment necessary for its use in fishing in the waters of the Pacific Ocean adjacent to the county of Humboldt. Thereupon an agreement was entered into between the plaintiff and the defendant that the plaintiff would have installed in said boat a gasoline engine and also supply the boat with the necessary equipment, then furnish the necessary fishing tackle for use by the defendant to enable him to proceed with his business of fishing in the waters just referred to.

To secure the repayment of the sums advanced by the plaintiff to the defendant, a bill of sale to the boat was executed by the defendant and delivered to the plaintiff. At the same time it was agreed that the defendant should make payment of the sums advanced by the plaintiff, by delivering all of the fish caught by him, to the plaintiff; that the plaintiff would credit the defendant with the value of a certain portion of the catch, and pay to the defendant the remaining value thereof. It was further agreed that the defendant would deliver all of the fish caught by him, to the plaintiff, until full repayment was made, and that if the defendant failed to deliver all of the fish caught by him, to the plaintiff, then and in that case the plaintiff might take possession of the boat.

Upon appeal it was held that the bill of sale did not transfer title, and that the agreement relative to taking possession of the boat by the plaintiff was void, in that it cut off the right of redemption, and that as we have said, the bill of sale was simply a mortgage.

Upon the coming down of the case, amended pleadings were filed by both the plaintiff and the defendant, and upon

a retrial the testimony introduced showed the facts which we have stated, and also the further testimony that in 1928, two years after the original agreement, when the defendant had defaulted in his promises, the plaintiff took possession of the boat, held it for a short time, and then the defendant and the plaintiff had a subsequent agreement in which it was agreed that the plaintiff should advance further sums, and the defendant then and at that time also further agreed that if he, the defendant, defaulted in any particular in the delivery of fish to the plaintiff and in making payment of the sums due the plaintiff, the plaintiff might take possession of the boat and tie it up, or put some one else in possession of the boat and use the boat in fishing.

The record shows that the defendant failed to comply with his agreement, and up to the time of the trial of this second action, had not repaid the plaintiff or made any demand for the repossession of the boat, which was again taken possession of by the plaintiff some time during the year 1929.

The testimony as to the second agreement, which we think was not incidental to the execution of the mortgage (denominated a "bill of sale"), is as follows:

"Q. (Mr. Hone). What if anything was said either by you or Mr. Durchman as to what was to happen if he failed to use the boat exclusively for that purpose?

"Mr. Beamer: Just a minute; we object to this line of testimony because the matter has already been tried and decided by the Supreme Court.

"Mr. Hone: There isn't any evidence in the transcript on the matter.

"The Court: Well, the objection is overruled this time.

"A. (Mr. Mercich): Mr. Durchman told me that if he didn't live up to his promise and deliver all of the fish to us, that we could take that boat away from him and tie it up until such time as that boat worked for Paladini; if we wasn't satisfied with him we could put another man on the boat and fish the boat.

"Q. (Mr. Hone): What was the second time that you had any conversation with Mr. Durchman relative to this matter? A. (Mr. Mercich): The second time was over the telephone from Fort Bragg.

"Q. Just prior to that conversation wasn't there a conversation at the office of someone

here in Eureka? A. Oh, we had taken Mr. Durchman up to Mr. McGrath's office in regard to getting security for the use of our engine, and also that he would live up to his contract, that he would stick by his word and deliver fish directly to Paladini.

"Q. And what was said at that time? A. That he would deliver every pound of fish to us, right in Mr. McGrath's office.

"Q. Who said that? A. Mr. Durchman.

"Q. What was the third conversation that you had with Mr. Durchman? A. The third conversation with Mr. Durchman was over the telephone from Fort Bragg; he was delivering fish to another firm in Fort Bragg.

"Mr. Beamer: We object to that on the ground it is hearsay.

"Q. (Mr. Hone): Do you know that of your own knowledge? A. (Mr. Mercich): Yes, sir; that he was delivering fish to another firm, and I instructed our manager in Fort Bragg to get a hold of the boat and tie it up; that he was not living up to his contract, that he was defrauding us out of our fish, and to tie up the boat, and Mr. Durchman called me up on the telephone and told me, he says: I have got a few dollars coming from this other concern, and when I collect it I will turn it over to the Company for part payment, and if I ever do that again, he says, you can take the boat away from me entirely.

"Q. If he ever does what again? A. If he ever delivered any fish to any other company besides ours until his bill was paid.

"Q. When was that conversation? A. That was in 1928."

[1] The testimony at the first trial related simply to the theory upon which the cause was heard, to wit, that the bill of sale actually transferred title. Upon the second action the testimony was introduced and the trial was had upon the theory that the bill of sale constituted a mortgage. For this reason there is a different construction and application to be given to section 2927 of the Civil Code, which reads: "A mortgage does not entitle the mortgagee to the possession of the property, unless authorized by the express terms of the mortgage; but after the execution of the mortgage, the mortgagor may agree to such change of possession without a new consideration."

[2] As we read the transcript there was a new consideration for the subsequent agreement in 1928, authorizing the plaintiff to take possession of the boat in the event

of a failure of the defendant to comply with the terms of the agreement relative to making payment of the indebtedness owing by him to the plaintiff, in that the plaintiff did agree to, and did furnish the defendant with additional fishing equipment and supplies necessary for him to continue his business as a fisherman. At the time of the filing of the amended complaint and the beginning of this action, on the theory that the bill of sale was a mortgage, the defendant owed to the plaintiff the sum of \$2,292.57, plus interest. Upon this appeal it is urged by the defendant that the decision of the Supreme Court found, as we have stated, in 216 Cal. 212, 13 P.2d 731, supra, is binding, and that the trial court was in error in awarding judgment of foreclosure. This overlooks the fact that the case was referred by the Supreme Court to the trial court for trial on the theory that the bill of sale was a mortgage, and for the introduction of such additional testimony, if any existed, to establish the right of the plaintiff to have judgment of foreclosure against the boat, and necessarily, the establishment of such rights as the plaintiff might have or be entitled to.

[3] The testimony which we have set out in this opinion, so far as we are able to ascertain, is additional to the testimony which was introduced upon the original trial. On the part of the appellant it is urged that it is simply supplementary. If this be admitted, it would not change the ruling which should be had under section 2927, supra. There is nothing in the Code section limiting the right of the parties, subsequently to the execution of the mortgage, to enter into an agreement relative to the taking of possession of personal property by the mortgagee, in the event that the mortgagor fails to comply with his agreement. Under the section cited, such an agreement need not be made at the time of the execution of the mortgage, but may be entered into at any time thereafter, and a failure on the part of the mortgagor to comply with his agreement would justify the mortgagee in taking possession of the personal property for the purpose of securing the indebtedness or the amount of money promised by the defendant to be repaid to the plaintiff.

The appellant in this case simply makes the statement that the testimony given at the first trial, and as introduced upon the second trial, is identical, without calling our attention to the testimony or setting out the same in support of the simple state-

ment. As we have said, there is a distinct difference between the theory upon which the first trial was had and the theory of the second. The first trial was upon the theory that the bill of sale transferred the title. The second trial was had upon the theory that the bill of sale was a mortgage; that the defendant had breached his obligation to pay, had failed to deliver fish as agreed upon; that in 1928, at the time when it appears that there was a question being raised as to the defendant breaching his agreement and delivering fish to other than the plaintiff, the defendant agreed, as shown by the testimony which we have set forth, that upon his subsequent failure to deliver fish, as agreed upon, and making payment to the plaintiff, the plaintiff might take possession of the boat. It appears that there was some thought of the defendant concealing the boat, which authorized the plaintiff to take possession thereof, prevent its being removed from the jurisdiction of the court, and likewise deprive the plaintiff of its security.

[4] Where there is a substantial difference between the facts shown upon the second trial, from the evidence offered on the first trial, the rule insisted upon by the appellant does not apply. *Dewees v. Kuntz*, 130 Cal.App. 620, 20 P.2d 733. This rule is supported in the following cases: *Mitchell v. Davis*, 23 Cal. 381; *Nieto's Heirs v. Carpenter*, 21 Cal. 455; *Cowell v. Snyder*, 171 Cal. 291, 152 P. 920. Other cases might be cited, but we deem the foregoing sufficient.

Under the theory that the bill of sale did not transfer title it was held upon the original trial that the evidence was insufficient to show that plaintiff was entitled to possession. This is not holding that under the theory and the law declared by the Supreme Court that the bill of sale was a mortgage, there could be no valid agreement between the parties that possession might be taken of the boat by the plaintiff on account of a breach of his agreement by the defendant to make payment and deliver fish exclusively to the plaintiff when the agreement was made subsequent to the execution of the mortgage, and at a time when the question arose as to the further supply of material and equipment in order to enable the defendant to continue his business as a fisherman.

In further support of what we have said as to the second agreement, it appears from the transcript, in the testimony given by

one Mercich, who was acting as an agent for the plaintiff at the time of the subsequent agreement, to-wit: "Mr. Durchman told me that if he did not live up to his terms and deliver all the fish to us, that we could take that boat away from him and tie it up until such time as the boat worked for Paladini. If we was not satisfied with him, we could put another man on the boat and fish the boat." The testimony was repeated in a different form, but the substance of it we have just stated.

[5] The contention of the appellant that when the plaintiff placed the boat in its fishing service, or rented it to others, it was guilty of conversion, is amply answered by the testimony which we have set forth, and justified the trial court in holding that the plaintiff rightly took possession of the boat to secure repayment of the funds advanced by it. The objection that the plaintiff did not sell the boat within a reasonable time, does not appear to have been raised upon the trial of the action. There is nothing in the pleadings which raises that question, nor does it appear from the record that the defendant ever made any demand for the return of the boat, or at any time ever offered or tendered to the plaintiff repayment of the moneys advanced to him by the plaintiff.

[6] We do not find any merit in the appellant's contention that the taking of possession of the boat under the terms of the bill of sale, construed as a mortgage, and the subsequent agreement relative to such possession, that the plaintiff waived its lien or in any manner jeopardized its right to the judgment of foreclosure entered in this action.

In the case of *Tracy v. Stock Assurance Bureau*, 132 Cal.App. 573, 23 P.2d 41, an almost identical situation was presented. There, certain shares of stock had been delivered as security for the repayment of money advanced. No repayment was ever made; no demand was made for the return of the stock. It was held that the lien was not waived.

To the same effect is the case of *Story & Isham Commercial Co. v. Story*, 100 Cal. 30, 34 P. 671; *Wixom v. Davis*, 57 Cal. App. 620, 207 P. 694. In that case reference is made to section 2927, *supra*, and it is held that the mortgagee was entitled to possession. See, also, the case of *Summerville v. Stockton Mill. Co.*, 142 Cal. 529, 76 P. 243. In that case it was held that in or-

der to constitute conversion there must be some act done contrary to a repudiation of the lien held by the plaintiff. Here, there is no showing of any repudiation of the lien, but there is a showing that the possession was taken in furtherance of the lien, and for the purpose of securing repayment of the moneys advanced by the plaintiff to the defendant.

[7] We do not find any testimony in the record justifying the claim of damages on the part of the defendant, but we do find that the allegations thereof in the defendant's pleadings are so general as not to need specific consideration herein.

There are other points made by the appellant for reversal, but what we have said we think necessitates an affirmance of the judgment of the trial court; and it is so ordered.

We concur: PULLEN, P. J.; THOMPSON, J.



24 Cal.App.2d 457

In re ALLMARAS' ESTATE.

ALLMARAS v. ALLMARAS et al.

Civ. 10642.

District Court of Appeal, First District,
Division 1, California.

Jan. 20, 1938.

Hearing Denied by Supreme Court
March 21, 1938.

1. Descent and distribution §47(2)

Under will describing testator as a single man without living issue and declaring that omission of persons other than those therein designated as beneficiaries, whether claiming to be an heir or not, was intentional, and that any person contesting the will whether named as a beneficiary or not should receive \$1 in lieu of provision which had been made or might have been made for such person, omission to provide for two sons was deemed intentional, and precluded their participation in division of estate as if testator had died intestate. Probate Code, § 90.

2. Descent and distribution §47(2)

Whether a testator intentionally omitted to provide for his children must be de-

termined from the will itself without resort to extrinsic evidence. Probate Code, § 90.

3. Costs §240

On reversal of a decree which erroneously distributed an estate to testator's two sons, although sons were not mentioned in the will on ground that omission was unintentional, rather than making distribution as directed in will, costs of appeal were to be paid out of the assets of the estate. Probate Code, § 1232.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding in the matter of the estate of John Allmaras, also known as John Miller, deceased, for a partial distribution. From a decree distributing the entire estate to John Allmaras and another, sons of the decedent, Robert Allmaras, claiming to be sole devisee and legatee under the will, appeals.

Reversed, with directions.

H. M. Anthony, Harold A. Harwood, and Norman P. Wilkie, all of San Francisco, for appellant.

Smith, Southwell & Smith and Hebard P. Smith, all of San Francisco, for respondents.

KNIGHT, Justice.

The questions here involved are whether the decedent omitted to provide in his will for his two sons, and, if so, whether it appears from the will that such omission was intentional. On proceedings for partial distribution the probate court found affirmatively on the first question, and negatively on the second, and accordingly distributed the entire estate, appraised at approximately \$3,500, to said sons. Probate Code, § 90. From the decree so entered the decedent's brother, claiming to be sole devisee and legatee under the will, has appealed.

Said section 90 of the Probate Code superseded section 1307 of the Civil Code. It was enacted in 1931, and reads as follows: "When a testator omits to provide in his will for any of his children, or for the issue of any deceased child, whether born before or after the making of the will or before or after the death of the testator, and such child or issue are un-

provided for by any settlement, and have not had an equal proportion of the testator's property bestowed on them by way of advancement, unless it appears from the will that such omission was intentional, such child or such issue succeeds to the same share in the estate of the testator as if he had died intestate."

The portions of the will necessary to be considered are the third, fourth, and fifth clauses thereof. In the third clause the testator declared that he was "a single man," that he had "no living issue," and that his "nearest living relatives" were eight brothers and sisters, all of whom he named. Three of them, according to recitals in the will, resided in North Dakota, two in Philadelphia, two in New York, and the whereabouts of the remaining one, a sister, were unknown. By the fourth clause the testator bequeathed his entire estate to his brother Robert (the appellant herein), or, in case of Robert's death, to the surviving brothers and sisters (except the sister whose whereabouts were unknown), or to the survivors of them; and the fifth clause was an exclusionary clause, reading as follows: "I have purposely made no provision herein for any other person, whether claiming to be an heir of mine or not, and if any person, whether a beneficiary under this will or not mentioned herein, shall contest this will or object to any of the provisions hereof, I give to such person so contesting or objecting, the sum of one dollar (\$1.00) and no more, in lieu of the provision which I have made or which I might have made herein for such person so contesting or objecting."

We are of the opinion that, as appellant contends, there is no substantial difference between the present case and the Estate of Minear, 180 Cal. 239, 180 P. 535, and the Estate of Lindsay, 176 Cal. 238, 168 P. 113, which arose under section 1307 of the Civil Code, and wherein it was held in effect that the testator in each case intentionally omitted to provide for his children except as set forth in the exclusionary clause, and that consequently, since they took under the exclusionary clause, the provisions of section 1307 were not available to them.

In the Estate of Minear, the testator declared in his will that he was "a single man," and that he had "never been married"; but by the exclusionary clause he provided that, "if there should be any other or others than the ones that I have named in my will above that claim to be my

lawful heirs and can and do prove that they are to each of them I will \$5.00 five dollars if there should be any such." Admittedly, there, as here, the testator was survived by children, who contended, as respondents contend here, that, since no reference was made in the will to children, the general expression "my lawful heirs," as employed in the exclusionary clause, must be taken not to have reference to children, but it must be presumed that the testator had forgotten his children and unintentionally omitted to provide for them. The Supreme Court held the contention to be unsound, saying: "Taking the two provisions together, we think it is perfectly clear that what the testator in effect said was this: 'I never have been married, therefore I have no children. But if any persons other than those named in my will prove they are my heirs (either as children or otherwise) I give each of them \$5.00.' The true construction of the will we believe to be that the testator intended to exclude from any substantial share in his estate anyone not named in his will, whether a child or otherwise."

In the Estate of Lindsay, the testator first bequeathed the entire estate to his wife, stating he did so purposely, knowing she "will provide for our son Clyde Lindsay"; and by the fifth clause in his will he declared: "Should any other person or persons present themselves claiming to be heirs of mine, I give and bequeath to such person or persons the sum of five dollars (\$5.00)." The fact was that the testator was survived also by two illegitimate children, who, by reason of a written acknowledgment executed by the testator during his lifetime pursuant to the terms of section 1387 of the Civil Code, were given full right of inheritance; and, claiming that the testator had unintentionally omitted to provide for them in the will, they sought, under the authority of said section 1307 of the Civil Code, to obtain the share of his estate to which they would have been entitled if he had died intestate. As in the Minear Estate, the court held that the testator intentionally omitted to provide for them, except as stated in the fifth clause of his will; and that consequently the provisions of said section 1307 of the Civil Code were not available to them. In so holding the court said: "The will showed that, at the time of its execution, the testator had a wife and one child. In the event that such wife and child should survive him, his heirs could not include any one

else, except other children, or the issue of deceased children. Civ. Code, § 1386. It must be presumed that the testator knew the law, and when, therefore, he spoke of persons claiming to be heirs, he could have had in mind only such persons as might claim to be children or their issue. The will, read in the light of the law of succession, shows on its face that the testator had in mind the persons, or the very class of persons, here asserting a right to succeed to a portion of his estate. He did make provision for all such persons, and the appellants, accordingly, do not bring themselves within the terms of section 1307, which is operative only where the testator 'omits to provide in his will for any of his children.'"

Furthermore, it was held to be immaterial whether in such exclusionary clauses a testator uses the word "heirs" or the words "persons claiming to be heirs," the court in this regard saying that, if as held in the Estate of Hassell, 168 Cal. 287, 142 P. 838, "the use of the general word 'heirs' * * was sufficient to show the intentional character of the failure to provide for the children not named, it must be equally operative to cover children in a clause bequeathing a legacy to any persons claiming to be heirs."

[1] Here, as shown, the testator first declared he was a single man and left no living issue, and then in the exclusionary clause of his will he declared he had purposely made no provision for "any other person whether *claiming to be an heir of mine* or not," and that, "if *any person*, whether a beneficiary under this will or not * * * shall contest this will or *object to any of its provisions*", such person should receive \$1.00 and no more, in lieu of any provision which he, the testator, "might have made * * * for such person so contesting or objecting." (All italics ours.) Therefore, applying the reasoning of the two cases cited, it must be held here, as it was there, that the omission to provide for respondents, except as declared in said exclusionary clause, was intentional, and that, such being the case, the provisions of said section 90 of the Probate Code are not available to respondents.

[2] Respondents have made no attempt whatever to differentiate the present case from the Estate of Lindsay; nor do they comment on the decision rendered in the

Estate of Minear more than to say that in that case there "was no forgetfulness shown upon the face of the will nor in the circumstances surrounding the execution of it"; and in this latter respect they call attention to and seek to have considered certain alleged extrinsic evidence which nowhere appears in the record on appeal. The law is well settled, however, that the question of whether the testator intentionally omitted to provide for his children must be determined from the terms of the will itself, and that extrinsic evidence may not be resorted to for the purpose of showing such intention (Estate of Trickett, 197 Cal. 20, 239 P. 406; Estate of Stevens, 83 Cal. 322, 23 P. 379, 17 Am.St.Rep. 252; Estate of Utz, 43 Cal. 200; Rhoton v. Blevin, 99 Cal. 645, 34 P. 513; In re Salmon's Estate, 107 Cal. 614, 40 P. 1030, 48 Am.St.Rep. 164); and, as already pointed out, the dispositive terms of the will in the present case are to all intents and purposes identical in form with those embodied in the will in the Estate of Minear, supra.

The numerous California cases cited by respondents in support of the probate court's ruling deal mainly with the rules prescribed for the guidance of courts in construing the terms of wills in proceedings of this kind; and as to such rules there is no dispute. Nor are any of the three cases cited by respondents from other jurisdictions controlling. It was expressly held in the Estate of Lindsay, supra, that the decision in the case of Boman v. Boman, 9 Cir., 49 F. 329, cannot be taken as authority in this state; the Nevada case, In re Parrott's Estate, 45 Nev. 318, 203 P. 258, even though based on a similar statute, is not in point for the reason that there the will did not embody, as here, any general exclusionary clause; and the Maryland case (Black v. Herring, 79 Md. 146, 28 A. 1063) merely holds that a proceeding instituted to construe the terms of a will is not deemed to be a "contest" to the will.

[3] Therefore, in accordance with the views above expressed and under the authority of the Estate of Minear, supra, and the Estate of Lindsay, supra, it is ordered that the decree appealed from be, and the same is hereby, reversed, and that a new decree be entered distributing to each of respondents the sum of \$1.00, as provided in the fifth clause of the will, and that the residue of the estate be distributed to the person or persons entitled thereto under the fourth clause of the will. It is further

ordered that the costs of appeal be paid out of the assets of the estate. Probate Code, § 1232.

We concur: TYLER, P. J., CASHIN, J.



24 Cal.App.2d 420

**PEOPLE v. OCEAN SHORE R. R., Inc.,
et al.
Civ. 10399.**

District Court of Appeal, First District,
Division 2, California.

Jan. 18, 1938.

Hearing Denied by Supreme Court
March 17, 1938.

1. Venue ⇐62

The statutes authorizing change of place of trial, and requiring transfer to a court that the parties may agree upon or to nearest unobjectionable court, do not require that all parties plaintiff or defendant join in motion for change of place of trial. Code Civ. Proc. §§ 397(2), 398, as amended by St.1933, p. 1843.

2. Venue ⇐33

The statutes governing change of place of trial manifest intent to secure to every litigant the right to trial before a fair and impartial tribunal, and to provide procedure for enforcement and protection of such right. Code Civ.Proc. §§ 397(2), 398, as amended by St.1933, p. 1843.

3. Eminent domain ⇐173

The statutory right to have eminent domain proceedings tried in county wherein the property sought to be taken is situated is conditional upon it not appearing that an impartial trial cannot be had in that county. Code Civ.Proc. § 1243; §§ 397(2), 398, as amended by St.1933, p. 1843.

4. Venue ⇐62

Any defendant in eminent domain proceedings may demand transfer of cause to another county for trial upon any of the statutory grounds without necessity of joining his codefendants. Code Civ.Proc. § 1243; §§ 397(2), 398, as amended by St.1933, p. 1843.

5. Venue ⇐62

The right of a defendant in eminent domain proceedings to demand a change in

place of trial is not dependent upon the separable or joint character of the issues, as between such defendant and codefendants.

6. Venue ⇐63

Notice of intention to move for change of venue of eminent domain proceeding was not necessary with respect to defendants for whom separate trial had already been ordered, nor to defendant that had actual notice of the motion and appeared in opposition thereto.

7. Appeal and error ⇐877(2)

On appeal by plaintiff in eminent domain proceeding from order allowing change of place of trial, plaintiff could not urge as error failure to serve notice of motion on codefendants who did not appear in the action nor join in the appeal, especially in absence of showing of prejudice to plaintiff. Code Civ.Proc. § 1243; §§ 397(2), 398, as amended by St.1933, p. 1843.

8. Venue ⇐72

It is contemplated that a motion for change of venue be heard before commencement of trial, and decision thereon need not be held in abeyance until attempt to secure impartial jury has been made, if sufficient reason to believe that impartial trial cannot be had appears. Code Civ.Proc. § 1243; §§ 397(2), 398, as amended by St.1933, p. 1843.

9. Appeal and error ⇐965

A decision on motion for change of place of trial because of inability to obtain impartial trial is reviewable only to extent of inquiring whether evidence adduced at hearing does not as a matter of law justify court's decision and whether trial court abused its discretion. Code Civ.Proc. § 1243; §§ 397(2), 398, as amended by St.1933, p. 1843.

10. Appeal and error ⇐901

A plaintiff in eminent domain proceeding appealing from order transferring cause for trial to another county has burden of pointing out deficiency in evidence to justify court's determination of whether impartial trial could be had in county originally designated.

11. Venue ⇐70

In eminent domain proceeding by state against railroad, it was not error to grant railroad change of place of trial to another county, where affidavits showed by reference to newspaper editorials and articles, reports of civic meetings and statements of

citizens, widespread prejudice against railroad and its cause. Code Civ.Proc. § 1243; §§ 397(2), 398, as amended by St.1933, p. 1843.

12. Venue ⇨70

Where defendant in eminent domain proceedings introduced 200 affidavits in support of its motion for change of place of trial on ground of prejudice, fact that 30 affidavits were repudiated by affiants did not require trial court to give less credibility to affidavits not repudiated or withdrawn.

13. Affidavits ⇨18

On hearing of motion in eminent domain proceeding for change of place of trial to another county, affidavits indicating prejudice against movant railroad by reference to newspaper editorials and articles, reports of civic meetings, and statements of citizens were admissible in evidence.

14. Venue ⇨75

An order in eminent domain proceeding transferring the action to another county for trial was not invalid as conflicting with and invalidating previous order by another judge whereby, pursuant to stipulation, the cause was set for separate trial as respects certain defendants, where trial had already been had as to such defendants and order transferring the cause did not purport to apply to them. Code Civ.Proc. § 1243; §§ 397(2), 398, as amended by St.1933, p. 1843.

15. Venue ⇨73

The statutory requirement that fees for transfer of cause to another county be paid at time of filing notice of motion to transfer cause is not jurisdictional to hearing of the motion, but directory only. Code Civ.Proc. § 399, as amended by St.1935, p. 1949.

16. Appeal and error ⇨186

On appeal from order transferring cause to another county for trial, objection that costs and fees of transfer were not paid at time of filing notice of motion for transfer could not be raised for first time upon appeal, especially where required fees had been paid at time of appeal. Code Civ.Proc. § 399, as amended by St.1935, p. 1949.

Appeal from Superior Court, San Mateo County; J. J. Trabucco, Judge.

Proceeding in eminent domain to acquire land for highway purposes by the People of the State of California, acting by and

through the Department of Public Works, against the Ocean Shore Railroad, Inc., and others. From an order transferring the cause for trial to the Superior Court in and for Alameda County, plaintiff appeals.

Affirmed.

Clarence W. Morris, Lincoln V. Johnson, and George C. Hadley, all of San Francisco, for appellant.

Keyes & Erskine, Henry E. Monroe, A. P. Black, Anthony S. Devoto, Hester W. Webb, and Louis S. Penfield, all of San Francisco, for respondent.

OGDEN, Justice pro tem.

This is a proceeding in eminent domain to acquire, for purposes of a state highway, several parcels of real property constituting a narrow strip running along the ocean coast of San Mateo county and embracing within it a railroad right of way owned by the Ocean Shore Railroad, Inc., the respondent here. The action is brought against thirty-two known and several fictitiously named defendants, each of whom, it is alleged, claim some interest in one or more of the parcels of land. Under the provisions of subdivision 2 of section 397 of the Code of Civil Procedure, as amended by St.1933, p. 1843, the respondent corporation moved for a change in the place of trial upon the ground that an impartial trial could not be had in the county of San Mateo. After hearing upon affidavits, the court below granted the motion and ordered the cause transferred for trial to the superior court in and for the county of Alameda. From this order the present appeal is taken by plaintiff.

Appellant first specifies as error the action of the trial court in granting a change in the place of trial upon the sole application of but one of the several defendants. It contends that, in order to secure a change of venue upon the ground that an impartial trial cannot be had in the county in which the action is properly brought, all of the defendants, if there be more than one, must join in the motion therefor. Apparently this precise question has never been passed upon by the courts of this state, at least, no such decision has been called to our attention.

We are referred to several authorities from the jurisdictions of Arkansas, Wisconsin, Kentucky, Indiana, and Maryland which hold that, in those jurisdictions, all of the codefendants must join in such a motion.

Klein et al. v. German Nat. Bank, 69 Ark. 140, 61 S.W. 572, 86 Am.St.Rep. 183; Wolcott v. Wolcott, 32 Wis. 63; Rupp v. Swineford, 40 Wis. 28; Whitaker v. Reynolds, 14 Bush 616, 77 Ky. 616; Peters v. Banta, 120 Ind. 416, 22 N.E. 95, 23 N.E. 84; Krutz v. Howard, 70 Ind. 174; Hutts v. Hutts, 62 Ind. 240; Baltimore County Com'rs v. United Railways Co., 99 Md. 82, 87, 57 A. 675; State v. Gore, 32 Md. 498; Cooke v. Cooke, 41 Md. 362, 366; Taxicab Co. of Baltimore v. Emanuel, 125 Md. 246, 93 A. 807. In the state of Indiana, however, this is no longer the rule, the earlier cases cited from that state having been expressly repudiated in the case of Dill v. Frazee, 169 Ind. 53, 79 N.E. 971. The cases cited are all based upon statutes giving the right to apply for a change in the place of trial to "either party to the action." They construe the word "party" as used in the statutes to mean all of the plaintiffs or defendants collectively and hold that under such construction the motion must be joined in by all who constitute such party. The decisions in the cases cited from Wisconsin, Indiana, and Maryland also are influenced by the fact that in those states the statute gives the absolute right to a change of venue upon the mere suggestion by either party of inability to secure an impartial trial.

[1] Section 397 of the Code of Civil Procedure, as amended by St.1933, p. 1843, provides that "The court may, on motion, change the place of trial * * * 2. When there is reason to believe that an impartial trial cannot be had therein." It does not, as do the statutes under consideration in the cases cited, require the motion therefor to be made by either party nor does it require the transfer upon a mere peremptory challenge. We find no indication from the wording of either section 397 or section 398 of the Code of Civil Procedure, as amended by St.1933, p. 1843, of any legislative intent to require all of the parties plaintiff or defendant to join in a motion for change in the place of trial. The latter section, in providing that the cause must, if the motion be granted, be transferred to a court which the parties may agree upon, or if they do not so agree, then to the nearest or most accessible court where the objection or cause for making the order does not exist, although it may require the unanimous action of all the litigants to agree as to the court of transfer, cannot be construed as requiring such a unanimity of action in seeking the relief afforded by the preceding section.

[2,3] The purpose and intent of the statute is to secure to every litigant the right to a trial of his cause before a fair and impartial tribunal and to provide the procedure whereby such right may be enforced and protected. In designating the county in which the property sought to be taken is situated as the place where eminent domain proceedings must be commenced and tried, the Legislature has expressly made such designation subject to the provisions of the Code for a change in the place of trial. Section 1243, Code Civ.Proc. Any right given by the Legislature to have the trial in the county so designated is thus made conditional upon it not appearing that an impartial trial cannot be had in that county. If it so appears, then the county first designated ceases to be the proper county for the trial of the action.

[4] It has been repeatedly held that, where the action is not brought in the proper county, any defendant, without joining his codefendants, may demand a transfer to the proper county. O'Neil v. O'Neil, 54 Cal. 187; McSherry v. Penn. C. G. M. Co., 97 Cal. 637, 642, 32 P. 711; Wood, Curtis & Co. v. Herman Min. Co., 139 Cal. 713, 73 P. 588, 589; Sourbis v. Rhoades, 50 Cal. App. 98, 194 P. 521; San Jose Ice Co. v. City of San Jose, Cal.App., 64 P.2d 1099. In O'Neil v. O'Neil, supra, it is said: "There is nothing in the provisions which require all the defendants to join in claiming such a right. It is a right which belongs to each defendant * * * it is one which every defendant can exercise for himself so long as the remedy exists. * * * Each defendant may waive it for himself, but the waiver of one cannot be used to prejudice or destroy the right of another."

The authority for transfer to the county designated as the proper place for commencement and trial of an action is contained in the same Code section which authorizes transfer when it appears that an impartial trial cannot be had therein. Section 397, Code Civ.Proc. We see no reason why the same rule should not apply to a transfer upon any of the grounds stated in the Code section. The right of a defendant to have the action tried in the county where the land is situated or where some of the defendants reside is no higher nor entitled to more protection than is his right to have it tried where an impartial trial may be had. An impartial trial means a trial impartial as to all litigants therein. If one

litigant cannot secure an impartial trial in that county, his right to a transfer to a neutral county cannot be defeated by the failure or refusal of his codefendants to join with him in his demand therefor. Nor is there any reason why his codefendants, against whom, or as to whose cause, there may exist no prejudice, should be required to join in demanding a right which does not affect them. To hold otherwise would, in many instances, operate as a denial of justice.

[5] Considerable attention is devoted by counsel in their briefs to the question whether the action is separable as between respondent and its codefendants. However, we find no necessity for here determining whether the interests of respondent and its codefendants in the parcels sought to be taken are such as would have permitted a separate trial as to the respondent and a transfer of the action as to it alone. Although, as will again appear later, the action was, by stipulation, separately tried as to certain of the other defendants, no motion for further separation of trial was made by any of respondent's present codefendants. It follows, from our views heretofore expressed, that the right of respondent to demand a change in the place of trial did not depend upon the separable or joint character of the issues as to it and its codefendants.

Appellant further urges as error the failure of respondent to give notice of its motion to its codefendants. The record before us does not show what, if any, defendants have been served with summons in the action, although it does show that summons was issued on June 24, 1935, and returned on February 15, 1936, and on the last-mentioned day an order authorizing service by publication was made. Respondent filed its notice of motion on September 18, 1935, and the motion was heard on May 22, 1936, and determined on June 15, 1936. Up to the last-mentioned date, and, as far as the record shows, up to the present time, the only other defendants who filed an appearance in the action were a group of defendants named Henshaw. As to these defendants the action was, by stipulation, separately tried before the Hon. Aylett R. Cotton, judge of the superior court of the county of San Mateo, without a jury. Although apparently not served with notice of the motion, another defendant, the Globe Wire-

less, Limited, a corporation, appeared in opposition thereto.

[6] It appears, therefore, that both at the time of filing notice of its intention to move for a change of venue and at the time of the hearing thereof, none of respondent's codefendants, except the defendants Henshaw, had appeared in the proceeding. As a separate trial had previously been ordered as to those defendants, no notice was required to be given to them. The defendant, Globe Wireless, Limited, had actual notice of the motion and appeared in opposition thereto.

[7] It is doubtful whether notice was required to be given to the other defendants, they not having entered an appearance in the action. In a similar situation, where motion for change of venue on the ground of residence was made by some defendants without notice to their codefendants, it was said in the case of *Wood, Curtis & Co. v. Herman Min. Co.*, supra: "If it be assumed that codefendants are adverse parties (Code Civ.Proc. § 465), as well as the defendants, and are entitled to service of the motion, these defendants * * * not having appeared when the motion was served and filed, service was not required upon them (Code Civ.Proc. § 1014)." In any event, none of the codefendants have joined in this appeal and appellant cannot be heard to complain for them. Appellant has not suggested or shown any prejudice resulting to it by any failure of notice to them.

It is contended that the court should have held in abeyance its ruling on the motion until the impanelment of the jury and the voir dire examination of the jurors disclosed that the respondent could not have a fair and impartial trial in the county wherein the proceedings were instituted.

[8] Such a procedure has been authorized and approved in criminal cases, *People v. Staples*, 149 Cal. 405, 86 P. 886, and by way of dicta in civil cases, *Cook v. Pendergast*, 61 Cal. 72; *Mono Power Co. v. Los Angeles*, 33 Cal.App. 675, 166 P. 387; *J. I. Case Threshing Co. v. Copren Bros.*, 35 Cal.App. 70, 169 P. 443, 447. We know of no authority, however, in this state, holding that such procedure constitutes the exclusive test by which it may be determined whether a fair and impartial trial may be had. In *J. I. Case Threshing Co. v. Copren Bros.*, supra, the court stated that it did not

hold that a change of venue would under no circumstances be granted until an unsuccessful attempt had been made to impanel a jury, and added that: "It is conceivable that a showing might be made of a prejudice against a plaintiff so widespread, intense and outspoken, through the public press and otherwise, as to warrant a conclusion that the plaintiff would not have a fair trial where the action was pending."

It is contemplated that a motion for change of venue be heard prior to the commencement of the trial. While, under the authorities above referred to, it might not be an abuse of discretion for the court, if still doubtful after a consideration of the evidence adduced at such hearing, to hold decision upon the motion in abeyance until an attempt to secure a fair and impartial jury had been made, there is no necessity for doing so if at such hearing there appears sufficient reason to believe that an impartial trial cannot be had.

[9-11] Whether or not a change of venue should be granted because of reason to believe that an impartial trial cannot be had in the county where the action is properly commenced is a question first addressed to the sound discretion of the trial court. On appeal this court may review such ruling only to the extent of inquiring whether the same constituted an abuse of that discretion. *Avila v. Meherin*, 68 Cal. 478, 9 P. 428; *Watson v. Whitney*, 23 Cal. 375; *Ross v. Kalin*, 53 Cal.App. 616, 200 P. 745. We cannot say that the trial court abused the discretion which is by law vested in it unless it clearly appears that the evidence adduced at the hearing of the motion does not as a matter of law justify such determination. *San Joaquin etc., Irr. Co. v. Stevinson*, 179 Cal. 533, 178 P. 292. The burden of pointing out such deficiency in the evidence is upon appellant. This burden appellant has here failed to sustain. It contents itself in this regard with citations of error in receiving in evidence certain affidavits, which it is claimed are remote and have no bearing upon the issues, and in giving consideration to other affidavits claimed to be of little weight and credence, particularly because of the manner by which they were secured.

[12] Nearly two hundred affidavits in support of its motion were submitted by respondent. Of these, some thirty affidavits were withdrawn at the hearing upon their attempted repudiation by the affiants. That

these affidavits were repudiated, however, did not, as appellant contends, require the trial court to give less credibility to those affidavits not repudiated or withdrawn.

Without attempting to detail all of the facts shown by the affidavits, it is sufficient to say that, if true (and it was for the trial court to determine their truth or falsity), they amply justified the exercise of the trial court's discretion. By reference to newspaper editorials and articles, by reports of civic meetings and statements made by numerous citizens of the county, the affidavits tend to show a widespread feeling of prejudice extending over a long period of years, both against the officials of respondent corporation and against its cause, such as would at least make it extremely doubtful whether an impartial trial could be had before a jury in that county.

Those affidavits showing expressions of prejudice and hostility toward respondent and its officers in connection with, and as a result of, similar proceedings in eminent domain previously brought by a joint highway district, but later abandoned because the compensation allowed was believed to be excessive, were not remote nor as to collateral matters. On the contrary, they had a direct bearing on the issue here involved.

[13] We find no error in the admission of the affidavits in question and are unable to say that the determination by the court below that a change in the place of trial should be granted constituted an abuse of discretion.

[14] Appellant makes two other points. It is contended that the order transferring the action to Alameda county for trial is in conflict with and an attempt to invalidate a previous order made by another judge. The order referred to is the order made setting the cause, pursuant to stipulation, for trial separately as to the defendants Henshaw before Hon. Aylett R. Cotton, sitting without a jury. The contention is without merit. The order transferring the cause to Alameda county obviously did not purport to be intended to apply to the defendants Henshaw. At the time of the making of the order, the action as to those defendants had been tried and submitted for decision.

[15,16] The point is made for the first time in appellant's reply brief of a non-compliance with the provisions of section 399, Code of Civil Procedure, as amended

by St.1935, p. 1949, requiring the costs and fees of transfer to be paid at the time of filing the notice of motion. Counsel for appellant concede that this was not brought to the attention of the court below. The requirement for the payment of fees does not appear to be jurisdictional to the hearing of the motion but is directory only. No objection having been made to the court below upon this ground, the point cannot now be raised for the first time upon appeal. Moreover, it appears from the certificate of the county clerk that the required fees have now been paid.

The order transferring the cause to the county of Alameda for trial is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.



24 Cal.App.2d 400

DAVIS v. LANE et al.

KUNDE v. SACRAMENTO NORTHERN
RY.

Civ. 5860.

District Court of Appeal, Third District,
California.

Jan. 15, 1938.

As Amended Jan. 19, 1938.

Hearing Denied by Supreme Court
March 17, 1938.

1. Automobiles ⇨215

The statute requiring locomotive engines to blow a whistle 1,320 feet from crossings does not apply to electric railways. Civ. Code, § 486.

2. Automobiles ⇨215

A motorman of an electric railway car who was killed at private crossing in collision between truck and railway car where view was unobstructed was not negligent in not sounding whistle of electric car at a distance greater than 950 feet from crossing, where truck driver and owner did not hear whistle until electric car was within 200 feet of crossing and did not look before entering crossing.

3. Evidence ⇨8

It is common knowledge that a truck, trailer, and semitrailer loaded with 24 tons of merchandise makes so much noise when in motion on highway that possibility of hearing whistle of electric railway train ap-

proaching crossing without stopping to look and listen is exceedingly remote.

4. Appeal and error ⇨1010(1)

The trial court's findings must be based upon some rational view of the evidence.

5. Negligence ⇨56(1)

Negligence is not actionable unless there is a causal connection between the negligent act and the injury.

6. Automobiles ⇨226(2)

Even if motorman of electric railway car was negligent in failing to sound whistle farther away than a point between 950 and 750 feet from private crossing, such negligence would not bar recovery for motorman's death and damages to railway car in collision with truck, where crossing was unobstructed and truck driver and owner did not hear whistle until car was within 200 feet of crossing and did not look, since there was no causal connection between failure to sound whistle at a more distant point and the accident.

7. Negligence ⇨56(3)

The violation of an ordinance or a statute must have some causal connection with injury inflicted in order to be actionable.

8. Automobiles ⇨215

A motorman is not negligent if he blows whistle of car at a distance from crossing when traveler, if listening, could have heard before entering crossing, and motorman continues to blow such whistle up to time of arrival of car at crossing.

9. Automobiles ⇨206

A motorman of electric railway car has right to assume that driver of a truck approaching crossing will observe the law of "look and listen" before proceeding to drive truck upon tracks.

10. Automobiles ⇨179

A person approaching a railroad track has no right not to look or listen because he has heard no signals of approaching trains.

11. Automobiles ⇨226(2)

A motorman of an electric car which collided with a truck and trailer at an unobstructed private crossing was not guilty of contributory negligence barring recovery for his death and damage to the car because he failed to sound whistle at a point beyond 950 feet from crossing, where occupants of

truck would have heard whistle in time to stop truck before arriving at track if they had listened, and they would have seen car in ample time regardless of whistle if they had looked.

Appeal from Superior Court, Sutter County; Arthur Coats, Judge.

Action by Ruth C. Davis against Paul Kunde, Gene Morrison, Henry Lane, and others, for the death of Thomas L. Davis, sustained in a collision between an electric car belonging to the Sacramento Northern Railway and operated by Thomas L. Davis, and a truck owned by Paul Kunde and Gene Morrison and operated by Henry Lane, wherein the Sacramento Northern Railway intervened, naming Paul Kunde and Gene Morrison defendants, sought to recover damages to the electric car, and Paul Kunde filed a cross-complaint against the Sacramento Northern Railway for damages to the truck. From a judgment denying damages to all parties, the plaintiff and the Sacramento Northern Railway appeal.

Judgments reversed as to both appellants and cause remanded, with directions.

Rehearing denied by Supreme Court; SHENK and HOUSER, JJ., dissenting.

Brown & Ford, of Colusa, for appellant Davis.

Lloyd E. Hewitt, of Yuba City, for appellant Sacramento Northern Ry.

Rich, Weis & Carlin, of Marysville, and Richard H. Fuidge, of San Francisco, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

This action was begun by Ruth C. Davis, plaintiff and appellant, the daughter of Thomas L. Davis, deceased, against the respondents Paul Kunde, Gene Morrison, and Henry Lane, to recover damages for and on account of the death of Thomas L. Davis, occasioned on or about April 14, 1936, in a collision between an electric car belonging to Sacramento Northern Railway, and operated by Thomas L. Davis, and a truck owned by Kunde and Morrison and operated by Lane. The Sacramento Northern Railway intervened in the action and filed a complaint against Kunde and Morrison to recover the amount of damages given to the electric car by reason of the collision. The respondent Paul Kunde filed

a cross-complaint against the railway company for damages to the truck. No damages were awarded to any of the parties herein. From this judgment the plaintiff, and also the Sacramento Northern Railway, appeals.

After making findings as to the relation of the plaintiff to the deceased, Thomas L. Davis, the amount of his compensation or earnings per month, the damages to the truck, and the damages to the electric car, the court made the following finding, the incorrectness of which furnishes the basis for the appeals just mentioned. The finding challenged is in the following words and figures: "The court finds the fact to be that at the time and place above set forth, Thomas L. Davis and cross-defendant, Sacramento Northern Railway, a corporation, were themselves guilty of contributory negligence in and about the matters and things in said complaint set forth, in this: That while at said time and place said Thomas L. Davis did blow a whistle at a point from about 750 to about 950 feet from the said crossing, the court finds said Thomas L. Davis to have given said warning in an insufficient time and at an insufficient distance to constitute a timely warning of the approach of said car to defendants Henry Lane and Paul Kunde, and the giving of said warning in insufficient time and at an insufficient distance as aforesaid, was a material, contributing element to the proximate cause of the death of said Thomas L. Davis."

That this finding is not supported by the evidence and is contrary to any rational conclusion or legal conclusion that can be drawn from the testimony clearly appears from what is set out in the transcript in this cause. The evidence set out in the appellant's briefs is admitted to be substantially correct by the respondents Lane, Kunde, and Morrison.

The record shows that on or about April 14, 1936, at 12:10 p. m., a collision occurred at what is known as "Harter's Crossing," a private crossing about 2 miles northwest of Yuba City in Sutter county, between an electric car owned by the Sacramento Northern Railway, and operated by Thomas L. Davis, now deceased, and a truck owned by the respondents Kunde and Morrison, and operated by the respondent Lane, an employee of Kunde. The track extends in an easterly and westerly direction. The private road extends in a northeasterly and southwesterly direction. To the east of the

crossing the railroad line is straight for over a mile. From a distance 20 feet back from the northerly rail the view of the track is unobstructed all the way to Yuba City (practically 2 miles). From a point 30 feet measured at right angles north from the northerly rail, but 38 feet from the crossing, the view of the track is unobstructed in an easterly direction for a distance of 875 feet. From a point 40 feet north of the northerly rail and 51 feet from the crossing, the track is unobstructed to the east for a distance of 570 feet. From a point 51 feet north of the northerly rail, and 60 feet from the crossing, the track to the east is unobstructed for a distance of 445 feet. It was a clear day. The truck and trailer and semitrailer had just been loaded with a little less than 24 tons of boxed prunes. The truck was traveling in a southerly direction toward the crossing in direct second gear, at a speed of between 4 and 6 miles per hour. The respondent Kunde, who was riding with respondent Lane, the operator of the truck, did not look to the left at any time. The truck could have stopped, according to the testimony, within 7 or 8 feet. The truck, trailer, and semitrailer was 59 feet long. The testimony shows that the driver, Lane, looked to the east only once before reaching the rails from a point about 30 to 33 feet from the north rail, and testified that he did not see the car. The car was proceeding in a westerly direction at a speed of about 45 miles per hour at the time the brakes were applied. There was a whistling post 977.3 feet from the center of the crossing, and a switch located 760.3 feet from the center of the crossing. The whistle of the electric car was blown between the whistling post and the switch, and was continually blown until the time of the collision. The brakes of the electric car were applied at or near the switch. The car signaled for the crossing by giving one long blast just as it passed the whistling post, and, as we have stated, continued whistling until it reached the point of the collision. Neither the driver nor the occupant of the truck saw the car until the cab of the truck was on the track. They testified that they did not hear the whistling of the car until they had reached that point, that the car at that time was about 200 feet away, and that it was the first time they saw the car or heard the whistle. The testimony shows that the driver of the truck did not stop, look, or listen before driving upon the track.

[1] The court found, as heretofore shown, that Thomas L. Davis was negligent in not giving timely warning of the approach of the electric car. This, as shown by an excerpt of the court's opinion herein-after set forth, appears to have been based upon the conclusion that the whistle of the electric car was not blown at a distance of 1,320 feet from the crossing, as required of steam locomotives by section 486 of the Civil Code.

A considerable portion of the briefs is devoted to the argument as to whether section 486, *supra*, applies to electric railroads, apparently overlooking the fact that this court, in the case of *Lining v. San Francisco, V. & Napa Valley Railroad Co.*, 18 Cal.App. 411, 123 P. 235, has definitely held that section 486, *supra*, does not apply to electric railways. This decision, not having been overruled or modified in any particular by any decision of the Supreme Court, must be held binding upon us upon this appeal, and needs no further consideration, other than to state that any conclusion of the trial court based thereon, as applied to electric railways, in determining the timely distance from a crossing at which the whistle on the car should be blown, is clearly erroneous.

[2,3] The finding of the court to the effect that timely warning was not given by the sounding of the whistle of the electric car at a distance greater than 950 feet from the crossing, in view of the testimony of the driver of the truck and the respondent Kunde, that they did not hear the sounding of the whistle until the car was within 200 feet of the crossing, is not only illogical but has no basis whatever in the record for its support. To hold, in face of the testimony of the defendants, that the whistle was not heard until the car was within 200 feet of the crossing, that a warning should have been given more than 950 feet from the crossing, is to make a finding and draw a conclusion as to the negligence of Thomas L. Davis which is shown to be absolutely erroneous by the mere statement thereof. That the defendants did not hear the whistle until the car was within 200 feet of the crossing is to preclude absolutely the idea that a whistle blown at a distance more than 950 feet from the crossing would have warned the respondents of the approach of the electric car. The court apparently overlooked what is common knowledge to everyone, that a truck, trailer, and a semitrailer loaded

with 24 tons of merchandise would make so much noise when in motion on the highway that the possibility or probability of hearing the whistle without stopping to look and listen would be exceedingly remote. Right here is the reasonable explanation of why the truck driver and his companion did not hear the whistle at a time when they were at a safe distance from the crossing, and when the truck could have been stopped within a very few feet.

[4] The finding of the court, to be upheld, must be based upon some rational view of the testimony. *Miller v. Forster*, 131 Cal.App. 509, 21 P.2d 678; *Lewis v. Lewis*, 167 Cal. 732, 141 P. 367, 52 L.R.A., N.S., 675.

[5,6] Should it be admitted that Thomas L. Davis should have sounded the whistle prior to reaching the whistling post, it does not follow that any negligence on his part contributed to the collision. This court, in the case of *Springer v. Pacific Fruit Exchange*, 92 Cal.App. 732, 268 P. 951, 953, held as follows: "The law is, of course, well settled that before negligence can be actionable, a causal connection, which proceeds in an unbroken point to the very point of the infliction of the injury, must be shown between the negligent act and the injury; for no matter how negligent a defendant may have been in the abstract, a cause of action is not made out unless that negligence is in some way fastened to the particular injury for which recovery is sought."

The same question was before this court in the case of *Ellis v. Burns Valley School District*, 128 Cal.App. 550, 18 P.2d 79, where the rule just stated was affirmed and additional authorities cited.

Not having heard the blowing of the whistle, and not having stopped the truck to look and listen for the blowing of a whistle or the approach of a car, and having testified that they did not hear the whistle until the car was within 200 feet of the crossing, the negligence of the respondents in driving the truck upon the track, which resulted in the death of Thomas L. Davis, and the collision referred to, it is made absolutely plain that there was not, and could not be, any causal connection between the failure of the motorman to sound the whistle of the car farther away than at a point between 950 and 750 feet from the crossing, and any finding of the court that timely warning

was not given by the sounding of a whistle is again shown to be without any support in the record, and illogical and unreasonable.

While not a part of the findings, the language of the trial court, as appears in the transcript, shows the erroneous basis for the trial court's reasoning and conclusions. For that purpose we set forth the following excerpt: "The other thing in this case, is that, under the law, the time notice is required to be given, should be given at a sufficient distance away to have people stand by the place of safety. That the Sacramento Northern Railroad Company, in this particular instance, has maintained, and is maintaining at the Harter Crossing, an invitation to negligence. As I understand it, they need not blow that whistle until they reach the whistling post, therefore, they put a post there, and if the trainmen complied with the warning, and notice was given at the whistling post, every time they approached the Harter Crossing they are guilty of negligence. Whether the Railroad Company are legally responsible for the death of the motorman, they created a situation which caused his death."

[7] The cases are so numerous that the violation of an ordinance or a statute to be actionable must have causal connection with the injury inflicted that we do not deem it necessary to list the same in this opinion.

In addition to what we have said, had the driver of the truck and the respondent Kunde obeyed the rule of stopping and looking and listening, no collision would have occurred. A little calculation shows that a car traveling at 45 miles per hour would travel approximately 66 feet per second, and that, as shown by the testimony, it would have taken the car more than 12 seconds to reach the crossing, assuming that its speed was not slackened by the application of the brakes, which the testimony shows to have been made. The truck, traveling at a speed of from 4 to 6 miles per hour, was traveling about 7½ feet per second. At the time the car started whistling, the truck was approximately 90 feet from the crossing, and out in the open. Had they stopped and listened, they could have not only seen the car, but in all reasonable probability could have heard the whistle being blown when the noise of the heavily loaded truck had ceased to interfere. The whistle on the

car was continuously blown while it traveled 550 feet, before the respondents testified that they heard the same; that is, the car had been traveling about 9 seconds while the respondents continued blindly approaching the crossing.

In the light of these facts, the question almost answers itself: What kind of a warning could have been given by the motorman of the electric car to warn the respondents of its approach?

Again, we may ask the question, if the respondents could not hear a whistle blown somewhere between 950 and 750 feet distant, how can it be reasonably concluded that, if the whistle had been blown at some point between 370 feet and 570 feet farther away, timely warning would have been given?

[8-10] The respondents rely upon the case of *Johnson v. Southern Pacific Co.*, 105 Cal.App. 340, 288 P. 81. That case has no application to the questions here presented. The testimony was to the effect that no whistle was blown, no bell was rung, and the four corners of the intersection of the street involved were occupied by buildings which obstructed the view. The case of *Rasmussen v. Fresno Traction Co.*, 138 Cal. App. 540, 32 P.2d 1091, is more to the point, where it is held that, if the motorman blows the whistle of the car at a distance when the traveler, if listening, could have heard, and continues to blow such whistle up to the time of the arrival of the car at the crossing, the motorman must be held not negligent; likewise, the motorman has a right to assume that the driver of a truck will observe the law of "look and listen" before proceeding to propel his truck upon the track of a railroad company. It is further said in that case, in substance, that one approaching a track has no right not to look or listen because he has heard no signals.

[11] There are two statements contained in one of the appellants' briefs that we think absolutely supported by the record and conclusive of this cause, to wit:

75 P.2d—36½

(1) If the occupants of the truck had listened they would have heard the whistle in sufficient time to have stopped the truck before arriving at the track. (2) If they had looked, they would have seen the car in ample time to have stopped, regardless of the whistle.

From what we have said it must be held that the finding of the trial court that Thomas L. Davis, the motorman in charge of the electric car, was negligent, or that any act on his part contributed to the collision, has no support in the record, and is therefore erroneous.

The judgment as to both appellants is reversed.

We concur: PULLEN, P. J.; THOMPSON, J.

Order Amending Judgment.

PER CURIAM.

The trial court in this cause having found the defendants guilty of negligence, from which no appeal has been prosecuted, and having found that the electric car belonging to the Electric Railway Company was damaged in the sum of \$1,724 in the collision referred to; and there appearing no testimony in the record showing that the motorman in charge of the electric car at the time of the collision was in any particular negligent:

It is therefore ordered that the judgment contained in the opinion filed in this cause on January 15, 1938, be amended to read as follows:

The judgment as to both appellants is reversed, and the cause remanded to the trial court, with directions to enter judgment in favor of the Sacramento Northern Railway Company, a corporation, in the sum of \$1,724, and then proceed to determine the damages to which the plaintiff Ruth C. Davis may be entitled by reason of the death of her father, caused by the collision referred to:

JONES v. WILTON.
L. A. 16311.

Supreme Court of California.

Jan. 26, 1938.

Rehearing Denied Feb. 24, 1938.

1. Limitation of actions $\hookrightarrow$ 127(2)

As regards whether action is barred by limitations, an amended complaint which does not set up a new cause of action is deemed filed at date of filing of original complaint.

2. Limitation of actions $\hookrightarrow$ 127(4)

An attorney's amended complaint seeking recovery for services based upon an account stated, which amplified allegations in original complaint and alleged that parties other than client were also liable to attorney under the account stated, did not set up new cause of action, barred by limitation, where terms of contract executed pursuant to account stated as shown in amended complaint made obligation of client and other parties joint and several, since under such circumstances client could be sued singly. Code Civ.Proc. § 337 as amended by St.1935, p. 1740, § 2.

3. Limitation of actions $\hookrightarrow$ 127(4)

That attorney's amended complaint for fees based upon an account stated, which showed others than the client also liable, disclosed that contract executed pursuant to account stated referred to client's obligation as a "guarantee" did not show client was being sued as a guarantor in amended complaint, instead of as a principal as in original complaint, so as to set up a new cause of action barred by limitations where amended complaint showed attorney's services were rendered to client and other parties jointly; word "guarantee" having been used in contract in sense of assurance of payment rather than promise to answer for debt of another. Code Civ.Proc. § 337, as amended by St.1935, p. 1740, § 2.

4. Account stated $\hookrightarrow$ 14

An account stated constitutes a new "contract" which supersedes the original contract, and an action upon an account stated is an action upon the new contract.

5. Account stated $\hookrightarrow$ 7

Where, under terms of account stated contract, client agreed to pay attorney specified sum, condition postponing time for payment of sum was valid integral part of account stated.

6. Limitation of actions $\hookrightarrow$ 46(1)

An action to recover for legal services, based upon written contract executed after services were rendered was an action brought upon the new promise contained in the contract, as regards limitations, where the promise contained in contract was qualified in that it postponed liability for payment until three years after the date of the contract. Code Civ.Proc. § 337, as amended by St.1935, p. 1740, § 2.

7. Limitation of actions $\hookrightarrow$ 46(6)

Where a creditor fails to act affirmatively to mature an indebtedness, evidenced by an instrument containing an acceleration clause, limitation statute is not set in motion notwithstanding acceleration clause is positive and not optional, since acceleration clause is for benefit of creditors and default cannot be taken advantage of by debtor to mature indebtedness. Code Civ.Proc. § 337, as amended by St.1935, p. 1740, § 2.

8. Limitation of actions $\hookrightarrow$ 46(6)

Where contract for payment of fees for legal services fixed a date when payment in full was required upon an account stated, with optional right in attorney to declare indebtedness due at end of six months, attorney's action brought within four years after due date specified was not barred even though suit was not brought within four years from date attorney could have declared indebtedness due, where attorney did not exercise his option to declare indebtedness due. Code Civ.Proc. § 337, as amended by St.1935, p. 1740, § 2.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Mark F. Jones against Hugh Wilton for attorney's fees, based upon an account stated. From an adverse judgment, the plaintiff appeals.

Reversed.

Prior opinion, 65 P.2d 1357.

W. L. Engelhardt and A. G. Divet, both of Los Angeles, for appellant.

A. P. G. Steffes, of Los Angeles, for respondent.

SEAWELL, Justice.

[1] Plaintiff appeals from a judgment entered for defendant on the ground that plaintiff's claim to recover the sum of \$20,-

000 was barred by the statute of limitations. Code Civ.Proc. § 337, as amended by St.1935, p. 1740, § 2. The trial court rendered judgment for defendant on the theory that the action was brought too late for the reason that the amended complaint set up a new cause of action. Otherwise the amended complaint would be deemed filed as of the date of filing of the original complaint. *Work v. County Nat. Bank & Trust Co.*, 4 Cal.2d 532, 51 P.2d 90; *Bowman v. Wohlke*, 166 Cal. 121, 128, 135 P. 37, Ann.Cas.1915B, 1011; *Frost v. Witter*, 132 Cal. 421, 427, 64 P. 705, 84 Am.St.Rep. 53; 16 Cal.Jur. 547.

[2] We are of the view that the trial court erred in its holding that the amended complaint set forth a new cause of action. It is alleged in the original complaint that plaintiff, an attorney at law, performed legal services for defendant prior to September 5, 1928. On that date an account was stated between them, at which time defendant executed an agreement by which he promised to pay plaintiff \$20,000 for such services. It is further alleged that by said agreement defendant "promised, undertook and guaranteed" that said sum with interest at 6 per cent. "would be paid to plaintiff on or before three years from and after September 5, 1928." Nonpayment of any part of said sum and the suspension of the statute of limitations for a time by reason of defendant's absence from the state are also averred.

The amended complaint set forth the agreement of September 5, 1928, with greater particularity than the original complaint, and annexed a copy to the complaint. Instead of alleging the performance of legal services for defendant, it alleged the performance of such services for defendant and the Los Angeles Housing Corporation and the Gibraltar Title Company. Defendant executed the agreement for himself and as president of said two corporations. It is averred in the amended complaint that by the contract of September 5 defendant and the two corporations "agreed that they were indebted to the plaintiff in the sum of \$20,000." It is further alleged that they agreed to assign trust deeds to plaintiff in the aggregate sum of \$50,000. They "jointly and severally undertook and agreed and guaranteed that the plaintiff would receive from said trust deeds the sum of \$20,000" with interest "within thirty-six months from and after September 5, 1928," and they

jointly and severally guaranteed the payment of said \$20,000 "irrespective of whether plaintiff received anything from said trust deeds." The amended complaint further alleged that only one trust deed, a second lien in the principal sum of \$10,000, had been assigned to plaintiff. The property subject thereto had been sold under foreclosure of the prior deed of trust, with the result that no part of the \$20,000 nor interest had been paid.

The failure of defendant Hugh Wilton to perform the agreement of September 5, 1928, is the foundation of both the original and amended complaints. It is true that the original complaint alleges a prior indebtedness of defendant Wilton to plaintiff and the execution of the agreement of September 5 by plaintiff and Wilton, while the amended complaint alleges a prior indebtedness of Wilton and the two corporations of which he was president, and that the agreement of September 5 was between plaintiff and defendant and said two corporations. But the obligation as to payment in full of \$20,000 upon a failure of plaintiff to realize payment through deeds of trust assigned to him was, by the terms of the contract of September 5, joint and several, and hence Wilton could be sued singly. *Goff v. Ladd*, 161 Cal. 257, 118 P. 792; 20 Cal.Jur. 504, citing cases. In view of this fact it cannot be held that the amended complaint set forth a new and different cause of action as to defendant Wilton by alleging that others than Wilton were parties to said agreement. *Lewis v. Adams*, 70 Cal. 403, 11 P. 833, 59 Am.Rep. 423; *Ginsberg v. Far-aone*, 126 Cal.App. 337, 342, 14 P.2d 777; 49 C.J. 817.

[3] Defendant contends that in the original complaint he is sued as a principal, whereas under the amended complaint he is as to a part of the indebtedness of \$20,000 a guarantor. The theory of defendant is that the indebtedness fixed at \$20,000 is the total of amounts severally owing from defendant and from the two corporations. There is nothing in the amended complaint to sustain this theory. The inference to be drawn therefrom is that all services were rendered to defendant and the two corporations jointly. While the contract used the word "guarantee," it is used in the sense of an assurance of payment, rather than a promise to answer for the debt of another. Furthermore, even if the indebtedness of

\$20,000 represented the total of sums owing from the three parties individually, defendant himself argues that the contract of September 5, 1928, constituted a novation. Upon the execution of said contract defendant and the two corporations assumed primary liability, jointly and severally, for the full \$20,000.

In support of his contention that the amended complaint states a new cause of action defendant relies on *Rodgers v. Byers*, 127 Cal. 528, 60 P. 42, and *Rogers v. Byers*, 1 Cal.App. 284, 81 P. 1123. It was held in said case that where an unconditional acknowledgment and promise to pay are made before the statute of limitations has run on a promissory note, an action brought after the time has run on the note is nevertheless upon the note, the effect of the acknowledgment being to continue liability on the note for the statutory period from the date of the acknowledgment. But where the acknowledgment and promise are conditional or qualified, the action must be brought on the new substituted promise. In the cited case it was held that where the original complaint alleged execution of the note and a general unqualified acknowledgment and promise to pay, and the amended complaint alleged execution of the note with a qualified promise of the debtor to pay when able, the amended complaint set forth a new cause of action which was barred when it was filed.

[4] We have some doubts as to whether *Rodgers v. Byers* would now be followed in view of more recent decisions that the amended complaint may be deemed filed as of the date of the original complaint unless it sets forth a "wholly" or "entirely" different cause of action. *Frost v. Witter*, 132 Cal. 421, 64 P. 705, 84 Am. St.Rep. 53; *Cowell v. Snyder*, 171 Cal. 291, 152 P. 920; *Ginsberg v. Faraone*, 126 Cal.App. 337, 14 P.2d 777; *Mackroth v. Sladky*, 27 Cal.App. 112, 148 P. 978; *Roullard v. Gray*, 30 Cal.App. 757, 159 P. 457. But conceding that said decision would be followed in a proper case, it does not govern the instant case. Here both the original complaint and the amended complaint declare upon an account stated—an agreement fixing a balance of indebtedness and promising to pay it. An account stated constitutes a new contract, which supersedes the original contract. The action is upon said new contract. *Bennett v. Potter*, 180 Cal. 736, 183 P.

156; *Partridge v. Butler*, 113 Cal. 326, 45 P. 678; *Mitchell v. Fleming*, 77 Cal.App. 241, 246 P. 152; *Klein-Simpson Fruit Co. v. Hunt, Hatch & Co.*, 65 Cal.App. 625, 225 P. 14; 1 Cal.Jur. 203. It has been held that a debt upon a specialty, such as the promissory note in *Rodgers v. Byers*, supra, cannot form the basis of an action upon an account stated. *Bennett v. Potter*, supra, 180 Cal. 736, at page 745, 183 P. 156; *Rio Linda Poultry Farms v. Fredericksen*, 121 Cal.App. 433, 9 P.2d 262.

[5] In the case herein both complaints alleged an account stated by the written agreement of September 5, 1928. By the terms of the account stated, as said account is described in the original complaint, defendant "promised, undertook and guaranteed" that the sum of \$20,000 "would be paid to plaintiff on or before three years from and after September 5, 1928." The postponement of the time of payment was an integral part of the account stated. Such a postponement is valid. *Mitchell v. Fleming*, supra; *Young v. LoPresti*, 95 Cal.App. 79, 272 P. 310. The amended complaint simply amplified the description of the instrument constituting the account stated by setting forth more fully its terms and the manner in which the \$20,000 would be paid. *Wells v. Lloyd*, 6 Cal.2d 70, 88, 56 P.2d 517; *Lovelace v. Free*, 11 Cal.App.2d 370, 373, 54 P.2d 82; *De L'Eau v. Williams*, 139 Cal.App. 116, 118, 33 P.2d 427; *Ginsberg v. Faraone*, 126 Cal.App. 337, 342, 14 P. 2d 777.

[6] Even under defendant's theory, which seems to be that the account stated on September 5, 1928, was separate from and antecedent to the promise of payment contained in the contract of September 5, said promise, as described in the original complaint, was not a general and unqualified promise within the rule of *Rodgers v. Byers*, supra, which would merely "continue" liability upon a prior obligation (the account stated) for the statutory period from the date of the promise. Said promise was qualified in that it postponed liability for payment until "three years from and after September 5, 1928." *Mitchell v. Fleming*, supra; *Rodgers v. Byers*, supra; *Maurer v. Bernardo*, 118 Cal.App. 290, 5 P.2d 36. Under the rule of *Rodgers v. Byers*, supra, where an acknowledgment and promise are thus qualified, the action

is brought on said new promise, rather than on the antecedent obligation.

Defendant further contends that notwithstanding the amended complaint is deemed filed as of the date of the original complaint the action is brought too late in any event. If, as plaintiff contends, the cause of action arose on September 5, 1931, then the action brought on October 1, 1935, is within the four-year period of limitation, since defendant was absent from the state for a time. But if the cause of action accrued on March 5, 1929, as defendant contends, the action was brought too late.

The purpose of the account stated on September 5, 1928, was to provide a method for payment of the pre-existing indebtedness, which method involved a postponement of the time for payment. Under said instrument it was contemplated that within thirty-six months from September 5, 1928, plaintiff would receive payment in full of the \$20,000 owing, with interest, through collections upon deeds of trust to be assigned to him by defendant. But by said agreement defendant Wilton and the two corporations which were parties to the agreement jointly and severally "guaranteed" payment in full irrespective of whether plaintiff received anything from said assignments. Following the provisions which set forth the plan for payment through assignments of deeds of trust is the following paragraph: "If, I, we or any of us, fail to deliver to you \$50,000 worth in interest in first mortgages or trust deeds as above stated, on or before six months from the date hereof, then we agree to pay you upon your demand the sum of \$20,000 together with interest thereon at the rate of 6% per annum from date hereof."

[7] The contingency referred to in this paragraph arose. The defendant failed to deliver to plaintiff trust deeds in the amount of \$50,000. The period of six months from September 5, 1928, expired on March 5, 1929, on which date, defendant contends, the statute of limitations commenced to run. Plaintiff contends that this provision is in the nature of an acceleration clause. If the creditor fails to act affirmatively to mature the indebtedness, the statute of limitations is not set in motion. This is the rule notwithstanding the acceleration clause is positive, rather than optional, in terms. Thus notwithstanding the acceleration clause provides,

that the obligation shall be due and payable "immediately" or "at once," it is held that the clause is not self-operative; that it is for the benefit of the creditor, and the default cannot be taken advantage of by the debtor to mature the indebtedness. *Belloc v. Davis*, 38 Cal. 242; *Mason v. Luce*, 116 Cal. 232, 233, 48 P. 72; *Richards v. Daley*, 116 Cal. 336, 48 P. 220; *Andrews v. Zook*, 125 Cal.App. 19, 13 P. 2d 518; *Stewart v. Claudius*, 19 Cal.App. 2d 349, 65 P.2d 933. This rule is not confined to promissory notes. *Stewart v. Claudius*, supra; *Congregational Church Bldg. Soc. v. Osborn*, 153 Cal. 197, 94 P. 881.

[8] We are of the view that the contention of plaintiff must be upheld. Here September 5, 1931, was fixed as the date when payment in full was required upon the account stated on September 5, 1928, with the optional right in the creditor to declare the indebtedness due at the end of six months if deeds of trust as provided for were not transferred to him. Plaintiff never exercised this option. Hence the statute of limitations did not start to run until September 5, 1931, and the action is brought in time.

The judgment for defendant is reversed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; EDMONDS, J.; LANGDON, J.; NOURSE, Justice pro tem



10 Cal.2d 470

MENGHETTI v. DILLON et al.

Sac. 5028.

Supreme Court of California.

Jan. 20, 1938.

As Modified on Denial of Rehearing

Feb. 17, 1938.

I. Trial $\Rightarrow$ 404(1)

Findings should be considered together and liberally construed in support of judgment and, if possible, should be reconciled so as to prevent any conflict on material points.

2. Appeal and error ⇨907(3)

On appeal on a judgment roll alone, findings are conclusively presumed to be supported by evidence, and findings should be liberally construed, and, if possible, any ambiguity or inconsistency should be resolved in favor of sustaining judgment.

3. Costs ⇨238(1)

Defendants were not entitled to recover costs on plaintiff's appeal from judgment for defendants, even though judgment was affirmed and reversal would have worked a grave injustice on defendants, where defendants were inactive for a long period of time when they might have brought case on for hearing or forced dismissal of appeal.

In Bank.

Appeal from Superior Court, Stanislaus County; L. J. Maddux, Judge.

Action by Frank Menghetti against A. W. Dillon and another to require defendants to apply certain property to the payment of a judgment and to enjoin defendants from selling, transferring, assigning, or interfering with that property pending judgment. From a judgment for defendants, plaintiff appeals.

Affirmed.

Griffin & Boone and Edward T. Taylor, all of Modesto, for appellant.

Brown & Chamberlain, of Modesto, for respondents.

PER CURIAM.

This is a controversy based upon allegations that personal property upon which execution had been levied under a justice's court judgment for \$229.80 was the property of the judgment debtor, notwithstanding a verified third party claim thereto by the other defendant, because a transfer or pledge thereof as security, claimed by defendant to have been made more than seven months before the levy, was not preceded by the recordation of notice of intention to transfer or assign, as required by the provisions of section 3440 of the Civil Code of the state of California. Plaintiff filed an equity action in the superior court, praying that defendants "be adjudged to apply the * * * property to the payment of the judgment," etc., and "that defendants be enjoined from selling, transferring, assigning or interfering with said property * * * pending judgment."

Issue was joined in the instant case and it went to trial. A decision in favor of plaintiff seems to have been rendered by the judge then in office, but neither findings nor judgment thereon were signed. Approximately six years after the complaint was filed the case was again brought to trial before the successor of the first judge. Immediately preceding the second trial a supplemental answer of the transferee defendant was filed alleging foreclosure, sale, and delivery of the property to another under a lien for services, labor, and skill for the improvement and safe-keeping thereof and the incidental costs and charges. The second trial resulted in judgment in favor of defendants, and plaintiff appealed, filing a judgment roll transcript in December, 1935.

No brief having been filed up to October, 1936, plaintiff was ordered by this court to show cause why the appeal should not be dismissed for want of prosecution. There being no appearance on the day fixed in the order, the appeal was ordered dismissed, but two weeks thereafter, upon joint request and stipulation of counsel for the respective parties, the order was vacated and thirty days was allowed appellant to file brief. On September 30, 1937, brief being still unfiled, another order of the same nature was issued and in response thereto the joint brief of the parties and a stipulation to submit the cause thereon were filed. On the calling of the order to show cause, the appeal was submitted for decision, pursuant to the stipulation.

In the brief appellant argues that some of the findings of fact are inconsistent with other findings, that one of the conclusions of law is inconsistent with the Code requirement for advertising above cited, and that the conclusions of law are not supported by the findings of fact. Instead of applying in the trial court and within the statutory time for correction of these claimed inconsistencies and insufficiencies by invoking the broad powers of the trial judge under section 662 to change or add to the findings, or under section 663, as amended, to enter another and different judgment, appellant now urges his highly technical points on appeal and asks a reversal of the judgment.

[1] "Findings are to be [read and considered together and] liberally construed in support of a judgment, and, if possible, are

to be reconciled so as to prevent any conflict upon material points." *Ames v. City of San Diego*, 101 Cal. 390, 35 P. 1005, 1006; *Murray v. Tulare Irrigation Company*, 120 Cal. 311, 49 P. 563, 52 P. 586.

[2] In "an appeal upon the judgment roll alone, the findings are conclusively presumed to be supported by the evidence; furthermore, it is also elementary that they are to receive, if possible, such a construction as will uphold rather than defeat the judgment thereon. They are to be liberally construed and, if possible, any ambiguity or inconsistency will be resolved in favor of sustaining the judgment." *Ochoa v. McCush*, 213 Cal. 426, 2 P.2d 357, 359; see, also, *In re Estate of Berry*, 195 Cal. 354, 233 P. 330; *Paine v. San Bernardino Valley Traction Co.*, 143 Cal. 654, 77 P. 659; *Gould v. Eaton*, 111 Cal. 639, 644, 44 P. 319, 52 Am.St.Rep. 201; *Warren v. Hopkins*, 110 Cal. 506, 42 P. 986; *Breeze v. Brooks*, 97 Cal. 72, 31 P. 742, 22 L.R.A. 257. Some of the cases in which this rule has been followed by the several District Courts of Appeal of California are: *Stockton Morris Plan Co. v. Carpenter*, 18 Cal.App.2d 205, 63 P.2d 859; *Hartford v.*

Pacific Motor T. Co., 16 Cal.App.2d 378, 60 P.2d 476; *Smalley v. Mountain States Life Ins. Co.*, 1 Cal.App.2d 747, 37 P.2d 498; *Swing v. Lingo*, 129 Cal.App. 518, 19 P.2d 56.

Applying the foregoing rules to the findings and judgment presented in the judgment roll herein, we conclude that the judgment is fully sustained.

[3] We are also satisfied from a view of the whole case as presented in the transcript (including the opinions of the two trial judges, which, while not properly a part of the record supply a recital of facts not otherwise presented), that there was no miscarriage of justice in the judgment appealed from. On the contrary it is apparent, because of the great lapse of time since the transfer under attack occurred, that a reversal of the judgment would work a grave injustice upon respondents. Because of the inaction of respondents, however, when they might have brought the case on for hearing or forced a dismissal of this appeal, we do not feel that they should recover costs on appeal.

The judgment is affirmed, without costs.

10 Cal.2d 476

LUCAS v. CITY OF LOS ANGELES.**L. A. 16144.**

Supreme Court of California.

Jan. 20, 1938.

As Modified on Denial of Rehearing

Feb. 18, 1938.

1. Automobiles ⇨187

A municipality is not liable in damages for injuries to passenger in automobile, struck by police automobile traveling at high speed on authorized emergency business in disregard of stop signal at street intersection. Civ.Code § 1714½; St.1929, pp. 539, 542, §§ 120, 132.

2. Automobiles ⇨175(3, 4)

The general statutory rules of road as to right of way and speed of motor vehicles do not apply to fire or police apparatus. St.1929, pp. 539, 542, §§ 120, 132.

3. Automobiles ⇨5(1)

The Legislature has power to determine what is or is not actionable negligence in operation of automobile under certain circumstances.

4. Automobiles ⇨152

The operation of automobile according to method pursued by prudent and reasonable persons through long-established custom is test of due care as distinguished from negligence.

5. Automobiles ⇨5(1)

The Legislature may change rules of road and establish new or different degree of care required in operation of automobile.

6. Statutes ⇨225

The statutes imposing new liability on state and its public agencies for ordinary negligence in operation of motor vehicles, exempting members of fire and police departments from liability for damages caused by their acts in line of duty, exempting drivers of authorized emergency vehicles from statutory speed restrictions, and granting such vehicles right of way over other vehicles, must be read and construed together as relating to same subject-matter. Civ.Code, § 1714½; St.1929, p. 568, c. 263; St.1929, pp. 509, 539, 542, §§ 8½, 120, 132.

7. Automobiles ⇨175(5)

The provision of statute exempting authorized emergency vehicles from speed regulations that driver of such vehicle shall

not be relieved from duty to drive with "due regard for the safety of all persons using the highway" merely requires him to give others reasonable opportunity to yield right of way by suitable warning. St.1929, p. 539, § 120.

[Ed. Note.—For other definitions of "Due Regard," see Words & Phrases.]

8. Automobiles ⇨175(3, 4, 5)

Negligence of driver of authorized emergency vehicle cannot be predicated on arbitrary exercise of privileges granted by statute exempting such vehicles from speed and right of way restrictions while responding to fire alarms or emergency police calls, if he gave proper warning to other users of highway while so engaged. St.1929, pp. 539, 542, §§ 120, 132.

9. Automobiles ⇨175(3, 4)

The statutory provision that exemption of authorized emergency vehicles from right of way and speed regulations shall not protect driver of such vehicle from consequence of arbitrary exercise of such privileges relieves public from liability for such driver's ordinary negligence. St.1929, pp. 539, 542, §§ 120, 132.

10. Constitutional law ⇨70(1)

The "privileges" referred to in statutory provisions that exemption of authorized emergency vehicles from right of way and speed regulations shall not protect drivers thereof from consequences of arbitrary exercise of such privileges are granted by Legislature, and cannot be determined by court or jury. St.1929, pp. 539, 542, §§ 120, 132.

11. Constitutional law ⇨70(3)

The courts will not decry wisdom or policy of enactment on purely legislative subject-matter because they are not in accord with lawmaking body's views.

12. Constitutional law ⇨70(3)

The court's fixed policy not to decry wisdom or policy of statute on purely legislative subject-matter will not be set aside indirectly by declaring that some fact question was before jury or that there was some conflict in evidence.

13. Automobiles ⇨245(53)

A dispute as to whether person injured by authorized emergency vehicle heard signal given by driver thereof presents fact question for jury to determine so far as material to issue of such person's contributory negligence. St.1929, p. 542, § 132; St.1935, p. 187, § 554.

14. Automobiles ⇨175(5)

An emergency vehicle operator's duty of care is performed by giving audible signal of its approach by siren, as required by statute giving him right of way in such case. St.1929, p. 542, § 132; St.1935, p. 187, § 554.

15. Automobiles ⇨175(5)

The employer of emergency vehicle operator, giving statutory notice of its approach by sounding audible signal by siren, is not liable for injuries to another, unless he arbitrarily exercised his statutory privileges. St.1929, p. 542, § 132; St.1935, p. 187, § 554.

16. Automobiles ⇨240(1)

The questions of authorized emergency vehicle's speed, right of way, or other rules of road, are immaterial in action against public owner thereof for injuries to another as alleged result of operator's negligence; only fact questions being whether there was emergency call, whether statutory warning of vehicle's approach was given, and whether operator arbitrarily exercised his statutory privileges. Civ.Code, § 1714½; St. 1929, pp. 539, 542, §§ 120, 132; St.1935, p. 187, § 554.

SEAWELL, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by Ethel Lucas against the City of Los Angeles to recover damages for injuries sustained in a collision between an automobile in which plaintiff was riding and defendant's police automobile. Judgment for plaintiff, and defendant appeals.

Reversed.

Prior opinion, 60 P.2d 1011.

Ray L. Chesebro, City Atty., F. von Schrader, Asst. City Atty., and Albert E. Wheatcroft, and Bourke Jones, Deputy City Attys., all of Los Angeles, for appellant.

F. Bert Fernhoff, City Atty., City of Oakland, and John W. Collier, Asst. City Atty., City of Oakland, both of Oakland, amici curiæ.

William S. Scully, of Los Angeles (Patterson & Montgomery, of Los Angeles, of counsel), for respondent.

William H. Hollander, of Oakland, amici curiæ.

NOURSE, Justice pro tem.

Plaintiff was a guest passenger in an automobile as it was being driven across a street intersection on its right side of the street, at a lawful rate of speed and in response to a mechanical "Go" signal. In the middle of the intersection a police automobile of defendant municipal corporation, operated upon authorized emergency business, traveling at a high rate of speed and disregarding the traffic "Stop" signal, crashed into it. Plaintiff, injured in the accident, was awarded damages of \$2,000 against defendant upon trial before a jury. Defendant appeals.

There is no material dispute in the facts. The parties agreed that the police car was an emergency vehicle responding to an emergency call at the time of the collision. Numerous witnesses testified that the siren was sounded continuously from 300 to 500 feet on its approach to the intersection. The operator of the car heard the siren and saw the car's approach in ample time to have either stopped or changed his course to avoid the collision. He thought he could beat the police car across the intersection, and increased his speed. The respondent does not contend that the siren was not sounded. For these reasons we must consider the case as one in which the statutory warning was given.

[1] The single question of law involved on this appeal is whether the municipality is liable in damages under these circumstances through the provisions of section 1714½ of the Civil Code as in effect at the time of the collision. Our conclusion that it is not liable rests upon our interpretation of the statutes based upon the rule of *Balthasar v. Pacific Elec. Ry. Co.*, 187 Cal. 302, 202 P. 37, 38, 19 A.L.R. 452.

[2] The *Balthasar* Case required an interpretation of section 20 (m) of the old Vehicle Act, St.1917, p. 402, which read in part: "Police patrol wagons, * * * fire engines and fire apparatus * * * shall have right of way with due regard to the safety of the public; but this provision shall not protect the driver * * * from the consequence of the arbitrary exercise of this right." Section 132 of the act, St.1923, p. 560, as amended by St.1929, p. 542, which was in effect when the accident involved herein occurred, used substantially the same language. Section 120, which was amended at the same time, St. 1929, p. 539, read: "The provisions of this act regulating the speed of vehicles

shall not apply to authorized emergency vehicles as defined in this act when such vehicles are being operated in the chase or apprehension of violators of the law. * * * The provisions of this section shall not, however, relieve the driver * * * from the duty to drive with due regard for the safety of all persons using the highway, nor shall it protect the driver of any such vehicle from the consequence of an arbitrary exercise of the privileges declared in this section." The provisions of section 20 (m) and 132 were carried into section 554 of the Vehicle Code, St.1935, p. 187; those of section 120 were carried into section 517, p. 180, of that Code.

When the Balthasar Case was decided in 1921 the statute did not contain the specific exceptions as to speed regulations herein noted, but this court held nevertheless that 187 Cal. 302, at page 308, 202 P. 37, 39, 19 A.L.R. 452, supra: "It follows that the general rules of the road relating to speed and to the turning of corners contained in the Motor Vehicle Act do not apply to fire or police apparatus. We have only to consider the utter absurdity of requiring peace officers to observe the arbitrary speed limits fixed by the Motor Vehicle Act when pursuing criminals, who may be fleeing in high-power cars at twice the legal limit, to make manifest that the Legislature did not have in view such a limitation on peace officers. And it is equally clear that they did not contemplate retarding the speed of fire apparatus in going to a fire." Cases were there cited holding that, because of the manifest necessity of enabling the public bodies to function for these purposes, statutes which may appear uncertain in this respect will be held either to contain an implied exception of the public, or will be held unreasonable and void.

Since this plain declaration was made the Legislature has met in eight regular sessions at each of which the Vehicle Act was either amended or revised, or enacted into a complete new Code. In none of those numerous changes has any amendment or revision been made of the particular sections here involved which would to the least degree alter the rule of the Balthasar Case. To the contrary, the amendments have adopted that rule and emphasized the legislative purpose to follow it. In November, 1933, *Armas v. City of Oakland*, 135 Cal.App. 411, 27 P.2d 666, 28 P.2d 422, was decided, and in July, 1934, *Tuten v. Town of Emeryville*, 139 Cal.App. 745, 35 P.2d 195, was decided. Both followed the rule

of the Balthasar Case, and both emphasized the necessity of holding these vehicles exempt from the rules of the road applicable to motorists generally. Two sessions of the Legislature have followed these decisions without any statutory change in that respect.

[3-5] Respondent relies upon *Rogers v. City of Los Angeles*, 6 Cal.App.2d 294, 44 P.2d 465, and *Lossman v. City of Stockton*, 6 Cal.App.2d 324, 44 P.2d 397, and states that they are the only two cases where the court rightfully had the construction of the statute before it. The first went off on the question of contributory negligence, while the second refused to follow the rule of the Balthasar Case because of changes in the statute, which we will show herein to have been immaterial. Though these and other decisions have been rendered casting some confusion on the subject, this court has never departed from the rule. We see no reason for departing from it at this time, and thereby establish a new rule of liability when the Legislature has refused to do so. The question involved is really a simple one, because it calls for nothing more than a judicial recognition of the power of the Legislature to determine what is or is not actionable negligence under certain circumstances. These rules of the road applicable to ordinary motorists are but legislative declarations of what is reasonable and prudent as opposed to what would be negligence. Thus a man will drive down the right side of a public highway not alone because the statutes say he must, but because, through long-established practice and custom, that has become the method of operation assumed by the prudent and reasonable person, which is the test of due care as distinguished from negligence. That the Legislature may in its wisdom change these rules and establish a new or different degree of care cannot be disputed.

In the *Armas* Case, upon the sounding of the siren, two street cars in obedience to law stopped at a street intersection and six or eight autos, also in obedience to the law, stopped at the same intersection, completely blocking traffic from the center of the street to the right-hand curb. The driver of the fire truck seeing this condition turned to his left and passed on the left side of the two standing street cars. The deceased walked out in front of one of these cars and was hit by the truck. The only grounds of negligence charged

were excessive speed and passing to the left of the street cars. It was there held in reference to the matter of speed, that there was no negligence in accordance with the express provisions of section 120 of the California Vehicle Act, as amended by St. 1929, p. 539, that: "The provisions of this act regulating the speed of vehicles shall not apply to authorized emergency vehicles * * * traveling in response to a fire alarm." It was also held in accordance with the rule of the Balthasar Case that the driver was not subject to the rules of the road in reference to passing to the left of a street car. There was, therefore, no negligence and no right of recovery against the city because under section 1714½ of the Civil Code the city's liability rested solely upon the "negligent operation" of the vehicle. This holding was amplified by the statement, also taken from the Balthasar Case, that any other ruling would be absurd and unreasonable because it would render impossible the operation of those vehicles for the emergencies for which they were designed. As an illustration of the necessity of the rule herein adhered to, that case is a better illustration than the instant case. There the street was blocked by cars following the express demands of the statute. No course was open to the fire truck except to the left of the street cars. The statutes declared that the driver was privileged to take that course. The jury, long after the fire was extinguished, held that he was not. Thus we say the question is a simple one—May the Legislature under its police power enact rules of conduct, or is that function left to the court or jury?

The Tuten Case followed the Armas Case upon the same rule of the Balthasar Case. That was a case where the deceased was struck when in the middle of the highway by a police motorcycle which at the time was chasing a violator of the law. The charge of negligence there was the excessive speed of the police vehicle. The ruling was merely that the statute declared that these speed regulations were not applicable to a case of that kind, and that, under the rule of the prior decisions, there was no actionable negligence.

[6] Another holding in the Armas Case which was supported by the ruling of the Balthasar Case was that, since section 1714½ of the Civil Code created a new liability, it must be strictly construed. This has been ruled in many cases decided both before and after that one.

See Cook v. Superior Court, 12 Cal.App. 2d 608, 55 P.2d 1227; Weber v. Pinyan, Cal.Sup., 70 P.2d 183, 112 A.L.R. 407. This section was chapter 260 of the Statutes of 1929, p. 565, Chapter 263 of the same statutes, p. 568, exempted policemen and firemen from all liability "for any act" arising out of the operation in line of duty and upon an emergency call. Chapter 253 of the same statutes p. 509, added section 8½ to the Vehicle Act, St.1923, p. 517, defining an authorized emergency vehicle. Section 120 of the Vehicle Act, and a part of this chapter 253, p. 539, added a new provision declaring that the release of such vehicles from the speed regulations shall not "protect the driver of any such vehicle from the consequence of an arbitrary exercise of the privileges declared in this section." Section 132 of the same chapter p. 542, exempted emergency vehicles from the right of way provisions of the act, but contains the same provision as to an arbitrary exercise "of such right of way."

All these sections must be read together and construed together because they all relate to the same subject-matter. The first imposes a new liability on the state and its public agencies for ordinary negligence in the operation of any motor vehicle. The second exempts all members of the fire and police departments from liability for damage for any act in line of duty. Section 120 of the Vehicle Act exempts the driver from all the restrictions of the act relating to speed, while section 132 expressly grants these vehicles a clear right of way and requires all other vehicles to yield to them.

[7] A simple analysis of these statutory provisions discloses the clear intention of the Legislature to recognize the paramount necessity of providing a clear and speedy pathway for such vehicles when actually confronted with the emergency in which the entire public may be assumed to be concerned. The expression "with due regard for the safety" of all persons using the highway was explained in the Balthasar Case, where the court said, 187 Cal. 302, at page 311, 202 P. 37, 41, 19 A.L.R. 452: "It is evident that the right of way of fire apparatus over other vehicles is dependent upon 'due regard to the safety of the public' only in so far as such 'due regard' affects the person required to yield the right of way. Notice to the person required to yield the right of way is essential, and

a reasonable opportunity to stop or otherwise yield the right of way necessary in order to charge a person with the obligation fixed by law to give precedence to the fire apparatus." This is the only reasonable interpretation that the statute will bear. If the driver of an emergency vehicle is at all times required to drive with due regard for the safety of the public as all other drivers are required to do, then all the provisions of these statutes relating to emergency vehicles become meaningless and no privileges are granted to them. But if his "due regard" for the safety of others means that he should, by suitable warning, give others a reasonable opportunity to yield the right of way, the statutes become workable for the purposes intended.

[8] The expression "arbitrary exercise of the privileges" has also caused some confusion. Since the vehicles are excluded from the restrictions of speed and right of way, negligence cannot be predicated on those elements if proper warning has been given. These are among the "privileges" which are granted by the statutes. An arbitrary exercise of them may rest upon the question whether an emergency in fact existed. The statute has determined this question in part by the limitation in section 120 to cases where the emergency vehicle is engaged in the chase of violators of the law or in response to a fire alarm. Members of the fire and police departments are relieved from civil liability when "responding to an alarm of fire or an emergency police call." Thus, if such a vehicle is being operated in response to a fire alarm, excessive speed alone is not an arbitrary exercise of these privileges. If these privileges were exercised in returning from a fire, or for some private purpose of the operator, it might be a case of an arbitrary exercise of them. Such is the effect of the rulings in *Hopping v. Redwood City*, 14 Cal.App.2d 360, 58 P.2d 379, and *Von Arx v. Burlingame*, 16 Cal.App.2d 29, 60 P.2d 305, where the facts disclosed that the public vehicles were not being operated in response to emergency calls at the time the injuries were inflicted. In David's "Municipal Liability for Tortious Acts and Omissions," page 141, the author advances the view that "the practical purpose of this phrase was to cover the cases in which the authorized emergency vehicle is not en route to the bedside of the sick man, the scene of the crime or the loca-

tion of the fire; but where the drivers, by virtue of the character of the vehicle and by use of its siren, maintain nonnecessary speeds and drive with abandon of the usual rules of the road, when there is no need. This is the case where the fire engine is returning from the fire, in the absence of any new call or emergency; where the engine of the motor vehicle is being warmed up or tested; when the policeman is making routine runs with no criminal in sight or immediate contemplation." To the instances there noted where this limitation might apply could be added one where the operator has given the required warning but sees that another has not heard or heeded it; under those circumstances it might be an arbitrary exercise of the privileges to continue on into an inevitable collision. This situation might raise an issue of fact similar to that involved under the last clear chance doctrine; the negligence of the operator of the emergency vehicle would then rest solely upon his arbitrary exercise of his privileges and not upon his disregard of the ordinary speed and right of way restrictions.

[9-12] Another view of the meaning and application of this expression is that it is similar to the charge of "wilful misconduct" in the ordinary guest cases. That expression has been defined in many cases which are cited in the recent opinion of this court in *Weber v. Pinyan*, 70 P.2d 183, 112 A.L.R. 407. In that opinion we quoted with approval the statement in *Helme v. Great Western Milling Co.*, 43 Cal. App. 416, 421, 185 P. 510, 512, where the court said: "'Willful misconduct' means something different from and more than negligence, however gross. The term 'serious and willful misconduct' is described by the Supreme Judicial Court of Massachusetts as being something 'much more than mere negligence, or even gross or culpable negligence,' and as involving 'conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its possible consequences.'" In *re Burns*, 218 Mass. 8, 105 N.E. 601, Ann.Cas.1916A, 787." The power of the Legislature to relieve the owner from ordinary negligence in a guest case has been frequently affirmed; but such power in relation to private owners is no greater than that in relation to a public owner. The

effect of this provision of the statute is that, when the public is made liable only in cases of "arbitrary" conduct on the part of the operator, it is, like the private owner in a guest case, relieved from liability for ordinary negligence. At this point arises the sole question of fact (aside from the question whether the siren was sounded) as to appellant's liability which the jury in the instant case could have determined if it had been raised in this proceeding—i. e., was there an arbitrary exercise of these privileges? These "privileges" are granted by the Legislature and are not to be determined by the court or jury. If by judicial decree the nonarbitrary exercise of these privileges may be declared to be negligence, then the whole purpose of the statutes is lost and the private opinions of the jurors is substituted for the solemn determination of the Legislature upon a subject which is clearly one which that body may determine in its discretion. It has always been the law that, when a subject-matter is purely legislative, the courts will not decry the wisdom or policy of the enactment because they are not in accord with the views of the lawmaking body. This fixed policy of the courts may not be set aside indirectly by declaring that there was some question of fact involved before the jury, or that there was some conflict in the evidence.

[13, 14] Some confusion has also arisen over the use of the expression in section 132 and similar statutes requiring the operators of these vehicles to "sound audible signal by siren." Section 554 of the Vehicle Code, St.1935, p. 187, has clarified this somewhat by using the language: "Upon the immediate approach of an authorized emergency vehicle giving audible signal by siren." It will be noted that it is the sounding or the giving of audible signal that fixes the right of way and relieves the driver of negligence. Where there is dispute as to whether the party injured heard the signal, it is a question of fact to be determined by the jury, but only in so far as that is material to the issue of his contributory negligence. The statutes are clear that when an audible signal is given the operator of the emergency vehicle has a clear right of way. The giving of the signal is the measure of care on his part, and if this is done his duty of care is performed, subject to the limitation as to "arbitrary" conduct as hereinbefore noted.

[15, 16] Our conclusions from the foregoing are that when the operator of an emergency vehicle responding to an emergency call gives the statutory notice of his approach the employer is not liable for injuries to another, unless the operator has made an arbitrary exercise of these privileges. In such cases speed, right of way, and all other "rules of the road" are out of the picture; the only questions of fact, in so far as the public owner is concerned, are first, whether there was an emergency call within the terms of the statute; second, whether the statutory warning was given; and third, whether there was an arbitrary exercise of these privileges. Here the emergency was conceded, the sounding of the siren was proved by the only substantial evidence offered, and an arbitrary exercise of the privileges has not been shown.

The judgment is reversed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; EDMONDS, J.

I concur in the judgment: HOUSER, J.

SEAWELL, Justice.

I dissent. The majority opinion is predicated upon the premise that the siren of the defendant's emergency vehicle was properly sounded as required by law. The jury impliedly found it was not, and this finding is amply supported. Negative testimony of the kind here involved has frequently been held to create a substantial conflict in the evidence. The opinion as written improperly weighs the evidence.

In addition it is my opinion that the majority decision incorrectly interprets the provisions of law involved, and fails to give effect to the obvious legislative policy therein embodied. I am of the opinion that section 1714½, Civil Code, by its clear and unequivocal language, imposes liability on governmental agencies for injuries to third persons arising out of the use and operation of all motor vehicles, whether being used in the performance of a governmental or proprietary function, and that neither that section nor any other statutory provision expressly or impliedly exempts governmental agencies from liability for torts growing out of the use and operation of authorized emergency vehicles. The exemption from certain provisions of the Vehicle Code, St.1935, p. 93, conferred on emergency vehicles merely makes the liability in each case a ques-

tion of fact; the arbitrary speed limit and right of way provisions not being applicable. In this connection I am satisfied to rest my opinion on the reasoning of the appellate court in *Rogers v. City of Los Angeles*, 6 Cal.App.2d 294, 44 P.2d 465, and *Lossman v. City of Stockton*, 6 Cal.App.2d 324, 44 P.2d 397. I am convinced that those cases correctly interpret the statutory provisions involved.



10 Cal.2d 512

BROCK, Director of Agriculture, v. FIDELITY & DEPOSIT CO. OF MARYLAND.

S. F. 15898.

Supreme Court of California.

Jan. 28, 1938.

Rehearing Denied Feb. 24, 1938.

1. Factors ⇨2½

Evidence held to show that payments made to produce dealers by commission merchants were "advances" which ordinarily imply a loan of money, in accordance with contract with dealers and not payments for particular fruit which merchants had sold for dealers knowing dealers had accepted fruit on consignment, as respects liability of surety on statutory bond of produce dealer. St.1927, p. 1812.

[Ed. Note.—For other definitions of "Advance; Advances," see Words & Phrases.]

2. Principal and agent ⇨54

Commission merchants who knew that fruit they sold for produce dealers was being handled for producer on consignment were accountable to producer, and where they did not pay for the fruit, the net proceeds of sale constituted a trust fund for which commission merchants were liable, since an implied contractual relation was established between commission merchants as subagents and producer.

3. Principal and surety ⇨149

A person seeking to hold a surety must act promptly.

4. Factors ⇨2½

Where producer accepted payment from commission merchants under settlement

agreement whereby producer consented to a reversal of judgment against merchants for proceeds of fruit sold by merchants with knowledge that produce dealers who had shipped fruit to merchants had accepted fruit on consignment from producer, and then dismissed the action, producer discharged surety on statutory bond of produce dealer, and hence producer's attempted assignment to merchants of his claim against surety was ineffective. St.1927, p. 1812.

5. Factors ⇨30

A dealer must be licensed under the Deciduous Fruit Dealers Act requiring a license of those dealing with growers of deciduous fruits in order to guarantee a price to a grower for his deciduous fruits, notwithstanding dealer may be licensed under Produce Dealers Act. St.1927, p. 1812; St. 1929, p. 665.

6. Principal and surety ⇨59

A surety cannot be held for anything which is not within the strict letter of its contract.

7. Factors ⇨2½

A surety on bond required of produce dealer under Produce Dealers Act regulating such dealers was not liable to producer on contract of dealer whereby dealer guaranteed price for deciduous fruits without having license required under the Deciduous Fruit Dealers Act to make such guaranty, since such contract could not lawfully be made. St.1927, p. 1812; St.1929, p. 665.

8. Factors ⇨2½

An action could not be maintained by the State Director of Agriculture on statutory bond of produce dealers for failure to pay proceeds of sale of fruits taken by dealers on consignment and sold for them by commission merchants, where commission merchants, under their agreement with producer, would profit by any recovery up to amount paid producer, inequitably allowing recoupment from surety, an amount for which commission merchants were liable, but the payment of which they avoided by buying out producer and becoming plaintiff in producer's action against them. St.1927, p. 1812.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by A. A. Brock, as Director of Agriculture of the State of California, against the Fidelity & Deposit Company of Maryland, on a bond given pursuant to Stats.1927, p. 1812, regulating produce dealers. Judgment for the plaintiff, and the defendant appeals.

Reversed, with directions.

Prior opinion, 69 P.2d 206.

Thomas E. Davis, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Frank English, Deputy Atty. Gen. (C. J. Carey and John Selby, both of San Francisco, of counsel), for respondent.

EDMONDS, Justice.

By this appeal, the right to recover upon a statutory bond given pursuant to the Produce Dealers Act of 1927, Stats.1927, p. 1812, is challenged by the surety. It contends that the judgment of the trial court in favor of the plaintiff is not sustained by the evidence.

The suit was brought by the Director of Agriculture, in his official capacity, in conformity with the provisions of the act. The real party in interest is C. G. DeRaad, a fruit grower, and the present controversy concerns his transactions with A. G. Johns and H. A. Bonzagni, doing business as Central Fruit Distributors. In the season of 1931 the latter were buying fruit to pack and ship to markets. They had received a license from the Department of Agriculture authorizing them "to act as Produce Dealer," and had given the bond required. The condition of this bond, upon which the appellant is the surety, is that the principal "shall well and truly comply with the provisions of the Act, and shall faithfully and honestly handle farm products as such licensed dealer."

In March, 1931, Johns and Bonzagni made a contract with Nash-DeCamp Company, commission merchants, with whom they had dealt for some time. This contract provided that the former, designated as the "shipper," were indebted to the latter, named the "distributor," for more than \$10,000 on account of past business; and that for the purpose of protecting this amount and in consideration of advances not exceeding \$2,500 to assist in handling the 1931 business, the shipper should permit the distributor to market all its 1931 shipments, subject to certain charges. It

was also agreed that the distributor might retain 7 per cent. of the selling price to apply on past indebtedness; that advances might be deducted from the proceeds; and that the distributor should have a lien on all funds belonging to the shipper, except the proceeds of fruit consigned to the shipper by the grower, to pay indebtedness and advances.

In the following month Central Fruit Distributors, as "shipper," and C. G. DeRaad, as "grower," entered into a contract by which Mr. DeRaad undertook to pick and deliver all apricots grown on his ranch in 1931 to the shipper, who in turn agreed to market them. A price of \$40 per ton was guaranteed, but later Mr. DeRaad waived this provision. Under this agreement Mr. DeRaad delivered 18,834 crates of apricots, to 5,996 of which the guaranteed price applied. Central Fruit Distributors forwarded the fruit to Nash-DeCamp Company, which shipped it East for sale and submitted accounts showing the amount received for each car of fruit. Central Fruit Distributors in turn rendered an account to Mr. DeRaad.

In the 1931 season Central Fruit Distributors dealt with other growers and delivered almost 40,000 crates of apricots, including those received from Mr. DeRaad, to Nash-DeCamp Company. The company paid them a little more than the proceeds of all fruit delivered to it, but did not apply these payments against the fruit of any particular grower, in spite of the fact (stipulated to at the trial of this action) that it knew at all times that Mr. DeRaad had consigned his fruit to Central Fruit Distributors for sale. Mr. DeRaad received only \$1,500 from Central Fruit Distributors, and at the close of the season there was due to him \$1,168.75 for fruit delivered on a guaranteed price basis and \$2,084.23 for that delivered on straight consignment. In August, 1931, he brought suit against Central Fruit Distributors and Nash-DeCamp Company. Central Fruit Distributors went into bankruptcy in January, 1932. Later, the plaintiff recovered judgment against Nash-DeCamp Company for \$2,084, the proceeds of the fruit delivered on consignment. From this judgment an appeal was taken, and it was affirmed. *DeRaad v. Nash-DeCamp Co.*, Cal.App., 23 P.2d 68.

Nash-DeCamp Company then petitioned this court for a hearing. While that proceeding was pending, the company's

attorneys arranged a most unusual settlement of the matter. Mr. DeRaad was paid \$2,453.47 as the amount of his judgment, interest, and costs. He signed a statement reciting that he "has changed attorneys in said action and appeal and that * * * has been and is substituted" for his former attorney. He also signed and verified a claim against Central Fruit Distributors and the appellant surety to be filed with the Department of Agriculture as the basis for a suit, and an assignment to Nash-DeCamp Company of this claim "and the indebtedness represented thereby." These instruments were delivered to counsel for Nash-DeCamp Company. An attorney selected and paid by that company then entered into a stipulation with Corbet and Selby, counsel of record for the company in the DeRaad case, that the petition for hearing in this court be granted, the judgment reversed, and the cause remanded for a new trial. Subsequently the same attorneys signed a stipulation in the superior court that the action be dismissed. This action was then brought upon a complaint which pleads the contracts made by Mr. DeRaad and the delivery of fruit made thereunder, and alleges that on July 28, 1933, the sum of \$3,322.28 remained wholly due, owing, and unpaid to him from Central Fruit Distributors and Fidelity Deposit Company of Maryland. The plaintiff also declares that Mr. DeRaad's verified claim for this amount was filed with the department and thereafter assigned by him to Robert H. Lee.

These facts are not disputed. However, the trial court made the following findings which are, more properly, conclusions of law: At the close of the season Central Fruit Distributors and the appellant, as surety upon the bond, owed C. G. DeRaad \$3,252.98 and interest, none of which had been paid; Nash-DeCamp Company never paid C. G. DeRaad for any of his fruit except by advances to Central Fruit Distributors, and is not responsible for the latter's failure to pay him. Moreover, the company was entitled to pay Central Fruit Distributors; the proceeds of its sales were not trust funds and it made proper accounting of them. At the time C. G. DeRaad made demand upon it the company had none of these proceeds in its possession.

There are further findings: C. G. DeRaad had no right to recover from Nash-DeCamp Company all or any part of the judgment which he obtained against it.

(This is directly contrary to the judgment in the case which was dismissed.) The company did not agree to nor pay this judgment. After the verified claim of Mr. DeRaad against Central Fruit Distributors and the appellant surety was filed with the Department of Agriculture, Nash-DeCamp Company furnished the consideration for an assignment of his claim for collection. The company did not accept the original assignment which Mr. DeRaad made to it, but returned it to him in substitution for one made to Robert H. Lee, who accepted the assignment and holds it for the benefit of Nash-DeCamp Company to the extent of \$2,453.47 and for the benefit of Mr. C. G. DeRaad to the extent of any excess. Neither the plaintiff nor Robert H. Lee is estopped from denying that Mr. DeRaad obtained a judgment, or that the judgment ever became final, or that it is *res judicata*, or that it has been paid. Furthermore, it is not inequitable to allow the respondent to recover from the surety upon the bond.

The appellant contends that it was exonerated from the obligation of its bond by the agreement of Mr. DeRaad and the Nash-DeCamp Company under which, it asserts, "the parties to the judgment united forces for the purpose of mulcting the surety company." It relies upon the rule that a surety is exonerated by any act of the creditor which prejudices its rights or lessens its security. Section 2840, Civ. Code. It also claims that the assignment made by Mr. DeRaad changed the status of Nash-DeCamp Company from that of a debtor of the grower, against which it could proceed by subrogation, to that of a creditor of the surety, in violation of section 2849 of the Civil Code.

[1] As against these contentions the respondent takes the position that Central Fruit Distributors was a factor, and as such was entitled to sell and deliver the fruit to Nash-DeCamp Company and to receive payment for it in advance of its sale by the latter. But the evidence shows conclusively that Nash-DeCamp Company never paid Central Fruit Distributors for the DeRaad fruit. It paid them a total of \$17,500 in various amounts which were entered upon its books as "advances." Clearly, it made these "advances" in accordance with the provisions of its contract with Central Fruit Distributors. The word "advance," as ordinarily used, implies a loan of money. *California Bean Growers' Ass'n v. Williams*, 82 Cal.App. 434, 255 P. 751; *Shelley*

v. Byers, 73 Cal.App. 44, 238 P. 177; 2 C.J.S. p. 497. The account of Nash-DeCamp Company with Central Fruit Distributors indicates the sale of forty lots of apricots, about one-half of which came from the DeRaad ranch, and shows that \$11,750 of the total advances were paid before it sold any of the DeRaad fruit. All the amounts advanced were in even thousands of dollars, except two of \$750 each, and no item shows any connection with the net amount due for the sale of any particular lot of fruit.

[2] Nash-DeCamp Company concedes that it knew Mr. DeRaad had consigned his apricots to Central Fruit Distributors; thus an implied contractual relation or privity was established between it as a sub-agent and Mr. DeRaad. This privity made the company accountable to him and, because it had not paid for the fruit, the net proceeds of its sales constituted a trust fund for which it was liable. *Petersen v. Lyders*, 139 Cal.App. 303, 33 P.2d 1030; *Bills v. Schliep*, 2 Cir., 127 F. 103; *Union Stock-Yards Nat. Bank v. Gillespie*, 137 U. S. 411, 11 S.Ct. 118, 34 L.Ed. 724.

[3,4] In bringing his action against Nash-DeCamp Company, Mr. DeRaad acted promptly, as he was required to do by the law of suretyship, and recovered a judgment which fixed the liability of that corporation to him. Afterwards, by accepting payment from the judgment debtor, he discharged the surety from any liability for the debt sued upon, and the instruments which he executed in favor of Nash-DeCamp Company and its nominee transferred no right of action. However, the suit was brought only for the amount due from the apricots delivered upon consignment, apparently upon the assumption that Nash-DeCamp Company was not liable for the proceeds from the fruit upon which Central Fruit Distributors had guaranteed a minimum price. The respondent claims that he is entitled to recover from the surety for this fruit as well as for that upon which no price was set.

[5-7] However, the Director of Agriculture has no cause of action. The bond sued upon was given in conformity with

the Produce Dealers Act of 1927, *supra*. Two years later the Deciduous Fruit Dealers Act of 1929, Stats.1929, p. 665, became a law. Only a dealer licensed under the later act may guarantee a price to a grower for his deciduous fruits. *Perkins v. Pacific Fruit Exchange*, 132 Cal.App. 278, 22 P.2d 535. It has been held that this act supplements the former and that "the possession of a produce dealer's license procured in accordance with the provisions of the Produce Dealers Act is not sufficient to excuse the failure of a dealer in deciduous fruits to have obtained the special license required by the Deciduous Fruit Dealers Act." *People v. Jarvis*, 135 Cal.App. 288, 27 P.2d 77, 84. Since the later act places upon dealers different and additional requirements not contemplated by or included within the terms of the earlier one, it follows that the surety cannot be held liable for an obligation arising out of a contract which its principals could not lawfully make under the license which they held. *Betzer v. Olney*, 14 Cal.App.2d 53, 57 P.2d 1376. The obligation of a surety is strictissimus juris, and it cannot be held for anything which is not within the strict letter of its contract. *Heidt v. Minor*, 89 Cal. 115, 26 P. 627. The contract of the surety guaranteed that the principals would comply with the provisions of the Produce Dealers Act, *supra*, not some other act thereafter passed by the Legislature.

[8] An additional reason why the judgment cannot be sustained is that in the present action, Nash-DeCamp Company, under its agreement with Mr. DeRaad, will profit by any recovery up to the amount which it paid. This would quite inequitably allow the company to recoup from the surety an amount for which it is liable, but payment of which it avoided by buying out its creditor and becoming the plaintiff in the case in which it was sued as a defendant.

The judgment is reversed, with directions to the trial court to enter judgment in favor of the appellant.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; HOUSER, J.

10 Cal.2d 488

WESTERN MACHINERY CO. v. BANKERS INDEMNITY INS. CO.

S. F. 15892.

Supreme Court of California.

Jan. 26, 1938.

1. Insurance ⇨311(1)

Under policy indemnifying owner against liability by reason of ownership of automobile and providing that "none of the insured automobiles are or will be used to carry passengers for a consideration, actual or implied," an injured person is bound by the limitation contained in the policy.

2. Insurance ⇨435

Under policy indemnifying insured against liability by reason of ownership of automobiles and providing that insured automobiles would not be used to "carry passengers for a consideration," actual or implied, insurer was liable for injuries sustained while insured was transporting by automobile a prospective customer to inspect machinery offered for sale, since such use was a permissible business use and was not using automobile to carry passengers for consideration, actual or implied, within exclusion clause of policy.

In Bank.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Western Machinery Company, a corporation, against Bankers Indemnity Insurance Company, a corporation, to recover on a policy indemnifying plaintiff against liability by reason of ownership of automobile. Judgment for plaintiff, and defendant appeals.

Affirmed.

For prior opinion, see 68 P.2d 382.

Charles B. Morris, of San Francisco (Leo J. McEnerney, of San Francisco, of counsel), for appellant.

Arthur P. Shapiro and Alfred C. Skaife, both of San Francisco, for respondent.

P. J. Murphy and M. Mitchell Bourquin, both of San Francisco, C. Ray Robinson, James D. Garibaldi, and Willard B. Treadwell, all of Merced, A. B. Bianchi, of San Francisco, Augustin Donovan, of Oakland, Bianchi & Hyman, of San Francisco, Fitzgerald, Abbott & Beardsley, of Oakland,

and Harold M. Child and David E. Peckinpah, both of Fresno, amici curiæ.

SHENK, Justice.

Western Machinery Company recovered a judgment against the defendant, Bankers Indemnity Insurance Company, in the sum of \$1,350 on an insurance policy issued by the defendant indemnifying the plaintiff against liability for accidental bodily injuries or death or for property damages by reason of the ownership of the automobile described in the policy. One Lawton was injured while riding in an automobile operated by one of the plaintiff's employees. The liability of the defendant was not questioned unless, under the undisputed facts, the carriage of Lawton in the plaintiff's automobile at the time was excluded from coverage by the declaration contained in the policy that the automobile would not be used to carry passengers for a consideration, actual or implied. There was also involved the question whether the use of the automobile at the time was a permitted business use under the policy provisions. The defendant has appealed from the judgment.

The only questions are whether the court correctly found and concluded that Lawton was not a passenger for a consideration within the meaning of the policy and that the automobile was being put to a use permitted by the policy, namely, for making a call in connection with the business of the plaintiff.

One of the insured's declarations forming a part of the policy was that "none of the insured automobiles are or will be used to carry passengers for a consideration, actual or implied." The plaintiff's business was designated in the policy as that of "machinery." Another item of the declarations was that the automobiles covered would be used for "business and pleasure," and defined that phrase as "personal, pleasure and family use, including business calls."

Lawton was being transported by the plaintiff's representative from San Francisco to Kyburz, where Lawton inspected some machinery which the plaintiff was offering for sale to Lawton's employer, the Union Paving Company. An accident occurred on the return trip through the negligence of the driver which resulted in injuries to Lawton. The Union Paving Com-

pany subsequently bought the machinery which Lawton had inspected. No monetary or other valuable return for the transportation of Lawton was made to the plaintiff.

The position of the defendant is that inasmuch as Lawton was not a "guest" within the meaning of the provisions of section 141¾ of the California Vehicle Act (Stats.1923, p. 517, as added by St.1929, p. 1580, as amended by St.1931, p. 1693, now section 403, Vehicle Code, Stats.1935, p. 154), prohibiting the recovery by a person injured through the negligence of his host, he necessarily became a passenger for a consideration within the meaning of the policy provision. The defendant seeks an interpretation of the word "consideration" used in the policy clause, as any "compensation" which is "given for the ride" within the provisions of the Vehicle Code.

The decisions in such cases as *Walker v. Adamson*, Cal.Sup., 70 P.2d 914, and *Haney v. Takakura*, 2 Cal.App.2d 1, 37 P.2d 170, interpreting statutory provisions, make no addition to the law applicable in the interpretation of insurance policies, which are restated in the cases hereinafter cited and do not require repetition here. See, also, *Worswick Co. v. Industrial Accident Comm.*, 181 Cal. 550, 560, 185 P. 953; 14 Cal.Jur., p. 443 et seq. No pertinent authority has been cited from this state on the question of when an automobile is "used to carry passengers for a consideration, actual or implied" as that phrase is employed in insurance policies; but the language has been interpreted in other jurisdictions.

In *Dahl v. Moore*, 161 Wash. 503, 297 P. 218, the Supreme Court of Washington held that the plaintiffs, who were riding in the defendant Moore's car for the purpose of inspecting real estate offered for sale by Moore's employer, were not gratuitous passengers but were entitled to recover damages for injuries suffered through Moore's ordinary negligence. The rule in that state was that gratuitous passengers could not recover for the ordinary negligence of their host. A subsequent action brought to recover on Moore's policy of insurance presented the question whether the automobile under the circumstances was being "used in the carriage of passengers for a consideration, express or implied."

The same court held that the facts did not constitute a carriage of passengers for a consideration. It also held that the use then being made of the automobile was a "business" use as defined in a policy designating the business of the assured as "real estate," and permitting business uses. *Central Surety & Ins. Corporation v. London & Lancashire Indemnity Co. of America*, 181 Wash. 353, 43 P.2d 12.

In *Ocean Accident & Guarantee Corporation v. Olson*, 8 Cir., 87 F.2d 465, 467, in discussing a similar clause, the court said that "the word 'consideration' in the policy clearly is limited to compensation for use of the car." It concluded that under the facts there presented the contribution to the expense of the trip had no relation to payments for use of the car. Supporting authority was found in *Park v. National Casualty Co., Iowa*, 270 N.W. 23, wherein a similar disposition of the question was made.

In *Marks v. Home Fire & Marine Ins. Co.*, 52 App.D.C. 225, 285 F. 959, where there was involved a condition which nullified the policy if the automobile was used in carrying passengers for compensation, the word "passenger" was defined as one who was carried for a fare by some established or public conveyance. See, also, note 14 A.L.R. 205, and cases cited; Huddy *Encyclopedia of Automobile Law*, p. 150; *Maringer v. Bankers Indemnity Ins. Co.*, 288 Ill.App. 335, 6 N.E.2d 307, 311; *Arms v. Faszholz*, Mo.App., 32 S.W.2d 781, 782. The Supreme Judicial Court of Massachusetts, however, rejected such a definition in a case involving a declaration that the automobile would not be used for carrying passengers for a consideration, and held that where the accident occurred during a single instance of carrying a passenger for a valuable consideration the insurer was exonerated from liability. *Sleeper v. Massachusetts Bonding & Ins. Co.*, 283 Mass. 511, 186 N.E. 778; see, also, *American Lumbermen's Mut. Casualty Co. of Ill. v. Wilcox*, D.C., 16 F.Supp. 799; *Neilson v. American Mut. Liability Ins. Co. of Boston*, 111 N.J.L. 345, 168 A. 436.

Then in *Jasion v. Preferred Acc. Ins. Co.*, 113 N.J.L. 108, 172 A. 367, an invitee, who was being transported on a trip the purpose of which was to inspect a cow with the object of purchasing it, was held not to be a passenger under the terms of a policy

excluding use of the commercial vehicle described therein to carry passengers regardless of whether a consideration was charged. It was the court's opinion that the carriage of the plaintiff was incidental to the business at hand, which was held to be a permitted use under the policy, and that he was therefore not a passenger. This decision also supports the conclusion in the present case that the transportation of the insured's prospective customer to inspect the machinery offered for sale was a business use of the vehicle permitted by the policy.

[1] In *Ocean Accident & Guarantee Corporation v. Torres*, 9 Cir., 91 F.2d 464, 471, the injured person who recovered judgment had been assisting her employer in some household domestic service and was not therefore a guest under the applicable section of the California Vehicle Act. The Circuit Court of Appeals for the Ninth Circuit dispelled the "dilemma"—that if the rider was not a guest precluded from recovery she was a fortiori a passenger for a consideration—by applying the principle of the case of *Malmgren v. Southwestern Automobile Insurance Co.*, 201 Cal. 29, 255 P. 512. It stated: "As we have already seen, the *Malmgren* Case, supra, holds that: 'The substantive law of this state cannot be enlarged, circumvented, defeated, or modified by any provision which the insurer may have elected to place in its contract in derogation of or in conflict therewith.' Within the spirit of that decision, the appellee herein is a third party 'for whose protection the law was adopted,' and she cannot 'be hindered, delayed, or defeated by the private agreements of two of the parties to a triparty contract.'" No other ground for the court's conclusion on that point was given, nor was any other authority cited in support thereof. It is true that the court referred to the act of 1919 (Stats. 1919, p. 776), which gives the injured person the right to sue the insurer, as containing no "limitation that, in order to recover, such injured person must not have been 'carried for a consideration.'" However, with the exception of the subject-matter there expressly covered, the act made such suit by the injured person otherwise "subject to" the "terms and limitations" of the policy. The *Torres* Case also involved the question as to which the act of 1919 and the decision of the *Malmgren* Case were

directly applicable. In connection therewith the court noted the later case of *Hynding v. Home Acc. Ins. Co.*, 214 Cal. 743, 7 P.2d 999, 85 A.L.R. 13, as approving the *Malmgren* Case. But it failed to note, in connection with the question now under consideration, that in the later case the *Malmgren* decision was rejected as not governing a matter which was not expressly covered by statute and which the act left subject to the agreement of the contracting parties. It is the *Hynding* Case, therefore, which is pertinent and controlling on the question here whether the parties' agreement as to the permissive uses is binding on the injured person. In the absence of any law declaring the obligation of the insurer in that respect, the conclusion is compelling that the injured person is bound by the limitations contained in the policy. Other cases hold that a breach of a declaration similar to that here involved constitutes a defense in an action by the injured person against the insurer. *Neilson v. American Mut. Liability Co. of Boston*, supra; *Orient Ins. Co. v. Van Zant-Bruce Drug Co.*, 50 Okl. 558, 151 P. 323. However, on the question of the liability of the insurer under a similar declaration, the result in the *Torres* Case is in harmony with the other cases reviewed herein on the facts there involved. Those decisions appear to be uniform at least on the question of what constitutes "consideration" as that word is used in insurance policies.

Cases such as *Neilson v. American Mut. Liability Ins. Co. of Boston*, supra, and *Sleeper v. Massachusetts Bonding & Ins. Co.*, supra, do not aid the defendant. They involved a monetary consideration passing to the insured. The authorities interpreting the pertinent provisions in insurance policies under circumstances similar to those here involved are opposed to the defendant's position.

[2] It follows that, as contemplated by the policy, (1) the plaintiff was not using the automobile to carry passengers for a consideration, actual or implied; and (2) the carriage of Lawton to inspect the machinery of the plaintiff was a permissible business use of the automobile—and the rights of the parties are governed accordingly.

The judgment is affirmed.

We concur: WASTE, C. J.; HOUSER, J.; CURTIS, J.; EDMONDS, J.; LANGDON, J.

24 Cal.App.2d 576

LARSON v. BLUE & WHITE CAB CO. et al.

Civ. 10597.

District Court of Appeal, First District,
Division 2, California.

Jan. 27, 1938.

1. Appeal and error ⇨1048(6)

Where record showed that, on defendant's request for stay of proceeding until security for costs required of nonresident plaintiff should be supplied, court examined plaintiff who testified to court's satisfaction that he was resident and defendants' counsel made no demand for permission to cross-examine plaintiff and expressed satisfaction with testimony given, contention that defendants were refused opportunity to cross-examine plaintiff was without merit. Code Civ.Proc. § 1030, as amended by St.1933, p. 1900.

2. Trial ⇨367

Where the cause is tried by the court sitting without a jury, counsel has no absolute right to argument.

3. Trial ⇨367

Whether argument shall be allowed in trial of cause or, if allowed, restricted is within the discretion of trial court.

4. Carriers ⇨280(1)

A taxicab operator owes to passenger for hire the duty to exercise the utmost care and diligence to provide safe transportation. Civ.Code, § 2100.

5. Trial ⇨367

Where evidence showed that operator of taxicab in which plaintiff was passenger for hire struck rear of automobile proceeding at slower rate of speed in same direction and in same traffic lane and visibility was good and operator's only explanation of cause of accident was that he did not see automobile until it was too late to stop, trial court did not abuse discretion in refusing to hear arguments on question of taxicab owner's liability.

6. Trial ⇨367

Where trial court allowed only two hours in which to collect cases pertaining to damages and appellants made no objection at time or requested more time, appellants could not urge that they had insufficient time within which to prepare.

7. Damages ⇨184

Evidence that plaintiff went to hospital following collision, but was discharged within few hours pending developing of X-rays, and that upon discovery of seriousness of injuries returned to hospital where he remained until finally discharged, was sufficient to show that plaintiff acted in good faith and exercised ordinary care, and was not contributorily negligent in failing to mitigate damages.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action for personal injuries sustained in an accident when a passenger for hire in a certain taxicab by Irwin W. Larson against Blue & White Cab Company, a copartnership, and others. Judgment for the plaintiff for \$3,000, and defendants appeal.

Affirmed.

Benjamin F. Curtaz, of San Francisco, for appellants.

Jackson & McCredie, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Action for personal injuries. Defendants have appealed, upon a bill of exceptions, from a judgment in favor of plaintiff in the sum of \$3,000.

Plaintiff was a passenger for hire in a certain taxicab operated by defendant David Page Cutten. It was stipulated between the parties that defendant Lloyd J. Long was the owner of the taxicab, that at the time of the accident the taxicab was being operated as a common carrier by defendant David Page Cutten as the employee and agent of defendant Long, and that at the time and place of the accident defendant Cutten was acting within the scope of his employment.

[1] At the time of the accident in question, plaintiff was a tourist from Michigan visiting in San Francisco. Defendants, therefore, made a demand for security for costs and requested a stay of proceedings until such security as required by section 1030 of the Code of Civil Procedure, as amended by St.1933, p. 1900, was supplied. Plaintiff took the stand and was examined by the court concerning his residence. Plaintiff testified that he

was living in Sacramento, that he was now a resident of California, and that he intends to make California his residence. At the close of this testimony the court stated: "I am satisfied with the testimony." Attorney for defendants stated: "Very well, Your Honor." Thereupon the case proceeded to trial. Defendants now contend that the court erroneously refused to permit cross-examination of plaintiff concerning his place of residence. There appears to be no merit in defendants' contention, for the record shows that defendants expressed their satisfaction with the testimony of plaintiff, and made no demand that they be allowed to cross-examine plaintiff. Likewise, defendants do not state in what manner they were prejudiced by this conduct of the trial court, nor does any prejudice appear from the record.

[2-5] At the close of the evidence, the court stated that it did not desire to hear any argument on the question of liability; that two hours hence counsel should be prepared with cases on the question of damages alone; that it had concluded plaintiff was entitled to judgment against defendants. Defendants assign as error the refusal of the court to hear argument on the question of liability. When the cause is tried by the court sitting without a jury, counsel has no absolute right to argument. The question of whether argument shall be allowed, or if allowed, restricted, is one within the discretion of the trial court. *Golden State Lumber Co. v. Sahrbacher*, 105 Cal. 114, 38 P. 635; *Nicholson v. Nicholson*, 174 Cal. 391, 163 P. 219; *Center v. Kelton*, 20 Cal.App. 611, 129 P. 960; *Dam v. Bond*, 80 Cal.App. 342, 251 P. 818. No abuse of discretion is shown herein. Plaintiff was a passenger for hire in the taxicab operated by defendants. As such, defendants owed him a duty to exercise the utmost care and diligence to provide safe transportation. Section 2100, Civ.Code. The evidence discloses that plaintiff was injured when the taxicab in which he was riding struck the rear of an automobile proceeding at a slower rate of speed in the same direction and same traffic lane as that in which the taxicab was proceeding. Although the accident occurred at night, the lights of both cars were burning and visibility was good. Although plaintiff and Rita Adams, a companion, were riding in the front seat with defendant Cutten, there is no evidence that

this interfered with his operation of the taxicab. Defendant Cutten testified that he drank some beer during the evening, but there is no evidence that he was intoxicated. There is a conflict of evidence concerning the speed at which the taxicab was operated and whether the highway was damp or dry. Defendant Cutten's sole explanation of the cause of the accident was: "I did not see the car until it was too late for me to stop." Under the facts as above stated, no abuse of discretion is apparent in the refusal of the court to hear argument on the question of liability.

[6] Defendants also complain that they were allowed only two hours in which to collect cases pertaining to the question of damages. The record does not show that defendants made any objection at the time or requested more time for preparation for argument on the question of damages. They are in no position to urge the point at this time.

[7] Defendants urge most seriously for a reversal that the evidence is insufficient to justify the judgment, in that the evidence shows that plaintiff failed to mitigate or minimize damages as required by law. In the case of *McKinney v. Red Top Cab Co.*, 113 Cal.App. 637, at page 641, 299 P. 113, 115, the court said: "It may be true, also, that there are certain circumstances tending to show that plaintiff acted imprudently in traveling and in caring for herself immediately following the accident; also in failing to obtain proper medical treatment after her return to San Francisco; but defendants introduced no affirmative proof whatever, medical or otherwise, to show that plaintiff's injuries were aggravated thereby, or that the permanency thereof was brought about by imprudence or neglect. Consequently, there is no evidence to establish, contrary to the implied finding of the jury, that she was guilty of contributory negligence." We believe that this rule is controlling here. The accident occurred about 2:45 a. m., June 7, 1936. Plaintiff arrived at the Villa Sanitarium in Daly City at approximately 3:15 a. m., and was immediately treated. X-rays were taken, and some time between 7 and 10 a. m. plaintiff left the hospital in the company of defendant Cutten. Plaintiff's doctor testified: "When he left he was discharged as to the head injury, pending development of the X-rays." Plaintiff and defendant Cut-

ten returned to San Francisco in a taxicab. They alighted at an apartment house and walked a distance of six blocks to plaintiff's hotel. Upon arriving there, plaintiff asked defendant Cutten to get him some whisky, which plaintiff then drank. In the afternoon, plaintiff was returned to the hospital in an ambulance and remained there until August 18, 1936. The record is without any evidence showing that plaintiff's conduct in any manner aggravated his injuries. The sole explanation of his departure from the hospital is the testimony of plaintiff's doctor that he was discharged pending the development of X-rays. There is no evidence showing that plaintiff was at that time fully apprised of the seriousness of his injuries. Upon discovery of the nature of his injuries, plaintiff returned to the hospital and remained there until he was finally discharged. "The evidence is ample to show that" plaintiff "acted in good faith and exercised ordinary care and diligence, which is all that is required." *Hamelin v. Foulkes*, 105 Cal.App. 458, at page 466, 287 P. 526, 529.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



24 Cal.App.2d 626

PEOPLE v. ANGELO.

Cr. 1590.

District Court of Appeal, Third District,
California.

Jan. 31, 1938.

Criminal law ¶147

An accused could not be convicted of petit theft, under indictment charging grand theft which was not presented until after expiration of one-year limitation for filing of indictment for misdemeanor. Pen.Code, § 801, as amended by St.1933, p. 1678.

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Michael E. Angelo was convicted of petit theft, and he appeals.

Reversed.

J. W. Hawkins and A. J. Carlson, both of Modesto, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Appellant was indicted for grand theft, being charged with the unlawful taking, on or about October 15, 1934, of the property of Tom Giahos, consisting of some \$500 in lawful money of the United States.

Appellant was tried and found guilty of the crime of petit theft, and judgment was pronounced. From this judgment and from an order denying his motion for a new trial, this appeal is prosecuted.

It appears that on September 26, 1934, and for some 18 years prior thereto, Tom Giahos, William Poulos, and defendant Angelo had been associated as partners in a produce and grocery business. On September 26, 1934, Angelo purchased the undivided one-third interest of Giahos in said business, and immediately Giahos severed all relationship with the partnership, which was thereafter conducted by Angelo as the owner of a two-third interest, and Poulos the owner of a one-third interest.

The sale from Giahos to Angelo was evidenced by a contract to purchase, by the terms of which Angelo agreed to pay Giahos \$8,500 for the interest of Giahos, of which \$5,000 was payable in cash, and the balance by a promissory note for \$3,500 which note was subsequently paid in accordance with the terms thereof. A bill of sale was delivered at the time of the consummation of the deal, and recited that in consideration of the sum of \$10 Giahos sold, assigned, transferred, and conveyed to Angelo all of his right, title, and interest in and to the specified business including all of the stock in trade, furniture, fixtures, equipment, and assets; the bill of sale reciting it was the intention of the seller to completely divest himself of any interest whatsoever in or to the business or building occupied thereby.

After these various papers evidencing the sale had been executed and delivered, Giahos and Angelo had a conversation wherein it is alleged that Giahos asked Angelo if he could give him a sum equal to one-third of the profits of the partnership for the months of August and September 1934, to which Angelo assented. It is growing out

of the profits for September that this charge was filed.

It appeared that it was the custom of the bookkeeper of the partnership, at the end of each month to prepare a profit and loss statement. There had never been an accounting of the business, the profits being allowed to accumulate. When the profit and loss statement was prepared for September, it showed gross sales for the month of September of over \$19,000, and an increase in the inventory from \$12,000 to \$16,000, with gross profits of over \$3,700, and with a net profit of approximately \$2,500. When Angelo examined this statement he stated that it showed too much net profit, as from his prior experience he knew that the gross profits should run about 13 per cent. or 14 per cent., and the net profit about 5½ per cent. to 6½ per cent. of the gross sales.

It was then testified that certain sheets of the profit and loss statement were withdrawn, which reduced the amount of stock to approximately the figure that Mr. Angelo considered was a fair representation of the standing of the company. This readjustment showed a net profit of \$885 for the grocery department and a net profit of some \$336 for the vegetable department. Thereupon a check was drawn to Mr. Giahos for \$407.03, which represented one-third of the profit based upon the amended inventory of the two departments of the businesses. This check was delivered to Mr. Giahos, who accepted and cashed it. No demand was ever made by Giahos upon Angelo for any other money, and no demand for any accounting was ever made upon Angelo by Giahos.

It also appears that neither of the new partners, Angelo nor Poulos, ever drew any money from the concern except their stipulated salaries, and all moneys earned by the business remained in the business, as well as all the accrued profits. During the trial an audit was made of the various inventory sheets prepared by the bookkeeper, which showed many errors and discrepancies.

At the conclusion of the hearing the court found that Giahos was entitled to an additional sum of \$110, after deducting all credits to which Angelo was entitled, and the court found that this money belonged to Giahos, and had been entrusted to Angelo, and had by him been appropriated to his own use, and thereupon found Angelo guilty of petit theft.

The complete answer to this appeal is that the prosecution was barred by the statute of limitations. The record shows that the taking, upon which the incident was based, occurred in the latter part of 1934, and the indictment was not presented until April, 1937. Section 801 of the Penal Code, as amended by St.1933, p. 1678, provides an indictment for any misdemeanor must be filed within one year after its commission. In *People v. Picetti*, 124 Cal. 361, 57 P. 156, the defendant was informed against for the crime of grand larceny but convicted of petit larceny. The crime had been committed more than one year prior to the time of the filing of the information. The judgment of conviction was reversed upon the ground the cause was barred.

This is a complete answer to the appeal, but we are urged to pass upon the various other points made by appellant in order that a reputable citizen in the community might not have against him the stigma of being accused of a crime and avoiding conviction thereof by relying upon the statute of limitations as a sole defense.

Points urged for reversal other than the legal defense of the statute are, First, the agreement by Angelo to give Giahos one-third of the net profits for the month of September was without consideration, and therefore an unenforceable contract. Second, no property belonging to Giahos was intrusted to Angelo, and therefore Angelo could not have been guilty of embezzlement. Third, Angelo did not convert any part of the September profits to his own use, and therefore could not have been guilty of embezzlement.

We have read the entire record presented to us in this case, from which it may be suspected the differences between these two business men was prompted more by personalities than by any apparent belief that a crime has been committed. No demand was ever made upon Angelo for the amount to which Giahos claimed he was entitled, nor was any request for any accounting ever made, nor any other steps which are usually taken when one is concerned in obtaining an adjustment of a business difference. We are considerably impressed also with the argument of the defendant that the transaction between himself and Giahos was completely consummated by the execution of the agreement to sell and the bill of sale, and the payment of the full consideration therein specified.

It appears to us that the subsequent payment by Angelo to Giahos of the net profits for August and September was perhaps prompted by a feeling of friendship existing between the partners of many years' standing, and not the result of any contract.

We are also impressed with the argument that inasmuch as none of the profits of the business for September were ever withdrawn by Angelo from the business, but all of the profits remained in the business, that it cannot be held that Angelo converted these profits to his own use.

However, for the reasons first given, the judgment and order must be reversed, and it is so ordered.

We concur: PLUMMER, J.; THOMPSON, J.



24 Cal.App.2d 615

URBINA v. McLAUGHLIN.

Civ. 10418.

District Court of Appeal, First District,
Division 1, California.

Jan. 28, 1938.

Hearing Denied by Supreme Court
March 28, 1938.

1. Appeal and error ⇐933(1)

Where the ground for new trial is insufficiency of evidence, every presumption is indulged in support of action of trial court in passing upon motion for new trial.

2. New trial ⇐71

Where evidence was conflicting and reasonably subject to different inferences, denial of new trial to bicyclist injured in collision with automobile was not abuse of discretion.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Morgan, Judge.

Action by Sofia Urbina against John J. McLaughlin for injuries sustained in collision between a bicycle and an automobile. From an adverse judgment, the plaintiff appeals.

Affirmed.

A. M. More, of San Francisco, for appellant.

O'Connor, Fitzgerald & Moran, of San Francisco (Harold H. Cohn, of San Francisco, of counsel), for respondent.

PER CURIAM.

An appeal by the plaintiff from a judgment entered on a verdict in favor of the defendant in an action to recover for personal injuries.

The injuries of which plaintiff complained arose from a collision between a bicycle on which she was riding and an automobile operated by the defendant. She moved for a new trial, which was denied; and she now contends that the evidence was such that the new trial should have been granted, and also that certain instructions to the jury were prejudicially erroneous.

[1,2] We have examined the record, and find that the evidence as to how the accident occurred, both as respects the testimony and the physical facts, is conflicting and reasonably subject to different inferences. Every presumption is indulged in support of the action of the trial court in passing upon a motion for a new trial, where the ground therefor is insufficiency of the evidence; and we cannot say that its discretion was abused in this instance.

We have also examined the instructions and find none which, if in any particular defective, can reasonably be said to have been prejudicially erroneous. No ground for reversal appears, and the judgment is accordingly affirmed.



24 Cal.App.2d 580

PEOPLE v. MOHR.

Cr. 3008.

District Court of Appeal, Second District,
Division 1, California.

Jan. 27, 1938.

1. Criminal law ⇐563

The corpus delicti of an offense need only be established by prima facie evidence.

2. Kidnapping ⇐5

Evidence that four-year-old child was observed by her older brother leaving home

in an automobile with a stranger and that child was not returned to her home until about 4½ hours later, after she had been discovered in a store three miles from her home, established the corpus delicti of the offense of child stealing. Pen.Code, § 278.

3. Criminal law ⇨563

The connection of the defendant or any other person with a crime is no part of the "corpus delicti," and frequently the corpus delicti of an offense is evident even though the culprit is never apprehended or is unknown.

[Ed. Note.—For other definitions of "Corpus Delicti," see Words & Phrases.]

4. Criminal law ⇨563

Evidence of defendant's acts or those of some other individual may be taken into account for the purpose of establishing the corpus delicti.

5. Infants ⇨20

Evidence of abduction of four-year-old girl by man was evidence of a purpose which would not be disregarded as evidence that a crime against the child had been committed, on the ground that it raised a mere suspicion. Pen.Code, § 288; Code Civ.Proc. § 1960.

6. Infants ⇨20

Evidence that man had abducted four-year-old girl, coupled with mother's testimony that the child's sexual organs had been injured and that there were black and blue marks on the outside of the child's thighs, was sufficient to establish the corpus delicti of offense described in statute relating to crimes against children. Pen. Code, § 288; Code Civ.Proc. § 1960.

7. Criminal law ⇨517(4)

The corpus delicti of offenses of kidnapping and of violation of statute relating to crimes against children having been legally proved, defendant's confession was properly admitted in absence of valid reason for exclusion thereof. Pen.Code, §§ 278, 288.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Gustave Mohr was convicted of child stealing and of violation of statute relating to crimes against children, and he appeals.

Affirmed.

75 P.2d—39½

Gladys Towles Root and Morey Stanley Mosk both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Buron Fitts, Dist. Atty., of Los Angeles, for the People.

DORAN, Justice.

Found guilty by a jury of the offenses set forth in sections 288 and 278 of the Penal Code, the defendant appeals from the judgment as well as from the order denying a motion for a new trial.

Briefly, it appears from the record that on the morning of April 9, 1937, one Dolores, a girl four years of age, was attending her younger sister and was playing with other children in front of the family home at Thirty-Seventh street and Maple avenue in the city of Los Angeles. Her eight-year-old brother, Leonard, was also present. About 9:45 a. m. Leonard discovered Dolores leaving in an automobile; she was seated in the front seat with the driver, a stranger. Leonard immediately ran into the house and told his mother, who in turn promptly informed the police. With the exception of the defendant's confession, there is no evidence of the whereabouts of the child until, at 11:15 a. m. of the same day, she appeared in a store three miles from her home and sought to purchase a penny box of matches. At this time and place strangers recognized the child's plight and informed the police. She was returned to her home about 2:30 p. m. of the same day.

It is urged by appellant that there is no evidence of "child stealing," the term given to the offense described in section 278 of the Penal Code, and that therefore the corpus delicti of the offense was not established; for this reason, appellant argues, defendant's confession was improperly admitted.

[1,2] It is elementary that the corpus delicti need only be established by *prima facie* evidence, and it follows from the facts briefly recited above that the evidence of the corpus delicti more than meets the requirements of the rule.

It is also contended by appellant that there is not sufficient evidence to prove the corpus delicti of the offense described in section 288 of the Penal Code. With regard to this alleged offense, the mother of the child testified as follows, referring to the examination of Dolores at the receiving hospital:

"Q. Did you take Dolores for a complete physical examination? A. Yes, sir I did.

"Q. Do you know of your own knowledge whether that examination revealed any injury to her sexual organs? A. Yes, there was a scratch there."

The child's mother further testified that there were black and blue marks on the outside of Dolores' thighs on both sides; that in the morning of the day of the alleged offense she had bathed the child and that the marks were not there at that time.

[3-6] Appellant argues that "In order to convict a man there must be conclusive evidence that a crime was committed, not mere suspicion. * * *" For reasons heretofore mentioned, such argument is without merit. Moreover, it should be noted that the connection of the defendant, or any other person, with a crime, is no part of the corpus delicti. Frequently the corpus delicti of an offense is evident even though the culprit is never apprehended, or is unknown. This does not mean, however, that evidence of the acts

of a defendant or of some other individual may not be taken into account for the purpose of establishing proof of the corpus delicti. As in the case at bar, the act of a man who abducts a four-year-old girl under the circumstances revealed by the record herein is evidence of a purpose which reasonable men will not disregard or reject on the grounds that, at most, as contended by appellant, it raises a mere suspicion. Section 1960, Code Civ.Proc. To the contrary, such an act on the part of an individual, when considered in connection with the testimony of the mother, hereinbefore referred to, is sufficient to establish the corpus delicti of the offense defined in section 288 of the Penal Code.

[7] The corpus delicti of both offenses having been legally proved, the evidence of the confession of the defendant was properly admitted in the absence of a valid reason for excluding the same.

For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: YORK, P. J.; WHITE, J.

GODDARD v. SECURITY TITLE INSURANCE & GUARANTY CO. et al. *

Civ. 11618.

District Court of Appeal, Second District,
Division 2, California.

Jan. 24, 1938.

Hearing Granted by Supreme Court
March 25, 1938.

1. Judgment ⇨570(4)

Where a dismissal is expressly declared to be "with prejudice" it is a bar to a second action on the same claim.

2. Judgment ⇨576(1)

An erroneous judgment, after it becomes final, is an effectual bar to a second action on the same cause of action.

3. Judgment ⇨701

The federal court's refusal to permit filing of third amended complaint and dismissal of action against trust company for loss of plaintiff's money which trust company loaned to third person without complying with plaintiff's instructions was res judicata so as to bar plaintiff's action against stockholders of trust company for loss of such money.

4. Judgment ⇨713(2)

A plaintiff cannot litigate his cause of action by piecemeal and, after an adverse judgment in one action, seek relief in a different action by alleging facts which should have been presented in the prior action.

5. Judgment ⇨632

If the liability of a defendant depends entirely upon the culpability of one who has been exonerated in a prior suit, he may rely on the judgment in the prior suit notwithstanding he was not a party thereto.

6. Judgment ⇨701

A judgment in favor of a corporation is res judicata in later action against stockholders on their liabilities which depended entirely upon culpability of corporation.

Appeal from Superior Court, Los Angeles County; Wm. J. Palmer, Judge.

Action by Herbert M. Goddard against the Security Title Insurance & Guarantee Company and others, upon their liability as stockholders of the Metropolitan Trust Company which allegedly paid over funds in violation of instructions. From an adverse judgment, defendants appeal.

Judgment reversed.

Mitchell, Silberberg, Roth & Knupp (by Guy Knupp), of Los Angeles, for appellants.

H. A. Savage, of Fresno, for respondent.

WOOD, Justice.

The defendant corporations appeal from a judgment in plaintiff's favor in the sum of \$38,965.19. Defendants are stockholders of Metropolitan Trust Company and the judgment is upon their liability as stockholders incurred, as alleged, before the repeal of the stockholders' liability law.

In the summer of the year 1930 plaintiff's nephew, Earle C. Dingwell, was the owner of some twenty parcels of real estate in Southern California and considerable personal property, which was considered to be of the value of approximately \$1,600,000. A number of the parcels of real estate were improved with furnished apartment houses and nearly all the properties were subject to mortgages, trust deeds, attachments and other encumbrances. There were also a number of unsecured creditors who were pressing Dingwell for payment. The total amount of the various claims was approximately \$1,000,000. In an effort to save his properties, which were producing a substantial income, Dingwell arranged to have Metropolitan Trust Company act as trustee in accordance with a plan whereby the trustee should hold the various properties, a certain amount of cash should be paid to the creditors, and their forbearance obtained. Plaintiff and one Pokress were each to advance the sum of \$50,000. On September 24, 1930, the sum of \$49,280 was forwarded by plaintiff to a Los Angeles bank, where it was held in the name of the trust company. On October 17, 1930, plaintiff sent the following telegraphic authorization to the trust company: "Deliver to Earl C. Dingwell funds on deposit to my credit if all conditions of trust are satisfactorily arranged." This sum was expended by the trust company. The trust continued in operation for almost two years. In the summer of 1932 the rentals had fallen off so that they were no longer sufficient to pay operating expenses and the amounts falling due on the encumbrances. Foreclosure proceedings were instituted, and in the course of the next few months all of the properties were lost. Plaintiff charges that his money was paid over to Dingwell in violation of his instructions, resulting in its loss. Defendants attack the findings of the trial court on this point.

As additional and affirmative defenses they allege the bar of a prior judgment and that the action is barred by the statute of limitations.

Plaintiff commenced an action in the United States District Court against Metropolitan Trust Company, which went to final judgment before the decision in the present litigation. In the federal court the allegations of the complaint were almost identical with the allegations of the complaint upon which plaintiff went to trial in the present litigation. In the federal court the defendant presented both general and special demurrers. From the judgment roll in the federal action it appears that the following minute order was made:

"It appearing from the second amended complaint that such liability as may attach against the defendant for the breach alleged in said complaint is limited to only such damages as are specifically alleged and proved to have resulted proximately from such breach, and it further appearing that the property alleged to have been conveyed to the defendant in trust was to be held as security for the repayment of the amount advanced by plaintiff, and that said property so conveyed was at the time of such conveyance subject to various encumbrances having priority over plaintiff's claim,

"And it further appearing that if such security was sufficient, irrespective of defendant's alleged breach, and that likewise if such security became inadequate or was lost because of conditions in no way caused by defendant's alleged breach, then such breach cannot be held to have been the proximate cause of plaintiff's alleged damage,

"And it further appearing that said amended complaint fails to allege any proximate or causal connection between defendant's alleged breach and plaintiff's alleged damage, and that said complaint is uncertain in each and all of the particulars specified in items numbered VII to XVI of the demurrer to said second amended complaint, It is Ordered, that said demurrer is sustained."

Permission to file a third amended complaint was denied and a judgment of dismissal was entered of which the following language is a part: "It Is Ordered, Adjudged and Decreed that the above entitled action be, and the same is hereby, dismissed with prejudice." An appeal was taken to the Circuit Court of Appeals and

the judgment of the District Court was affirmed. *Goddard v. Metropolitan Trust Co.*, 9 Cir., 82 F.2d 902.

Plaintiff contends that "the question of *res adjudicata* * * * was entirely eliminated from this action by the amendment of the pleadings to conform to proof, * * *" and that "the defective allegations with reference to causal connection between the damage suffered by plaintiff and the disobedience of instructions as set forth in the ruling of the Federal District judge" were supplied. In the original complaint it is alleged that plaintiff's money was disbursed by the trustee contrary to his instructions, that the security taken by the trustee was valueless, and that the money "has been entirely lost to plaintiff." In the amendment it is alleged that "solely by reason of the violation of plaintiff's said instructions * * * all of the trust estate * * * was valueless as security * * * and was lost and taken away from said trust company * * * and all of plaintiff's money was lost. * * That had said trust company complied with plaintiff's said instructions * * * there would have been adequate and ample security, by means of * * * which security plaintiff could have been * * * repaid in full his said \$49,280, and that thereby plaintiff was damaged * * * all of which damage was proximately caused by the violation of plaintiff's said instructions."

[1, 2] It is to be noted that the District Court not only refused to permit a further amendment to the complaint, but it dismissed the action with prejudice. In *Freeman on Judgments*, 5th Ed., volume 2, page 1582, it is said: "So where a dismissal is expressly declared to be 'with prejudice' it is held to be a bar to a second action on the same claims." In California, express recognition has been given to the rule just quoted. *Matteson v. Klump*, 100 Cal.App. 64, 279 P. 669; *Steffens v. Rowley*, 10 Cal.App.2d 628, 52 P.2d 493. In *Hargis v. Robinson*, 70 Kan. 589, 79 P. 119, 121, it is said: "An order dismissing 'with prejudice' is equivalent to an adjudication upon the merits, and will operate as a bar to a future action." It is manifest that the federal court intended to put an end to the litigation. In view of the matters set forth in the order sustaining the demurrer and the rulings refusing permission to file a third amended complaint and dismissing the action with prejudice, it must be held that the general demurrer was sustained

and that the action was determined upon the merits. We are not concerned with the question whether the prior judgment was erroneous, since an erroneous judgment, after it becomes final, is an effectual bar to a second suit upon the same cause of action. *Akley v. Bassett*, 68 Cal.App. 270, 228 P. 1057. Moreover, it is clear that plaintiff sought in the federal court a determination of his right to relief arising out of the deposit of money with the trust company and the disbursement of that money by the trust company.

[3,4] It was incumbent upon him to allege such facts, if they existed, as would entitle him to the relief sought. Plaintiff cannot litigate his cause of action by piecemeal and, after an adverse judgment in one action, seek relief in a different action by alleging facts which should have been presented in the prior action. *Woolverton v. Baker*, 98 Cal. 628, 33 P. 731. Beyond question the cause of action litigated in the federal court was the same as that in the present litigation. Plaintiff cannot meet the defense of *res adjudicata* by relying upon his amendment to the complaint to conform to proof. By this amendment no different cause of action is set forth, no different right is asserted, and no different wrong on the part of the trustee is alleged.

[5,6] Plaintiff argues that the plea of *res adjudicata* may not be asserted by defendants for the reason that in the action in the federal court the party defendant was Metropolitan Trust Company, whereas in the present action the parties defendant are the corporations owning the stock of Metropolitan Trust Company. It is a general rule that a judgment against a corporation is not *res adjudicata* in a later action against the stockholders on their liability for the reason that neither the parties nor the law imposing the liability are the same in the two actions. A stockholder may defend an action commenced against him to enforce his liability as a stockholder even though a prior judgment had been rendered against the corporation. An exception to the general rule is presented in the case of a judgment in favor of the corporation in the prior action. If the liability of a defendant depends entirely upon the culpability of one who has been exonerated in a prior suit he may rely upon the judgment in the prior suit notwithstanding he was not a party thereto.

Duell v. Metro-Goldwyn-Mayer Corporation, 128 Cal.App. 376, 17 P.2d 781; *Armas v. City of Oakland*, 135 Cal.App. 411, 27 P.2d 666, 28 P.2d 422. The question now before us was decided adversely to the contention of plaintiff in *Triano v. F. E. Booth & Co., Inc.*, 120 Cal.App. 345, 8 P.2d 174, 175. In that case a judgment was entered in a federal court in favor of the corporation, none of the stockholders being made parties defendant. The second suit was commenced in the state court against the corporation and its stockholders. In upholding a judgment in favor of both the corporation and the stockholders upon a plea of former adjudication, the reviewing court said: "The federal court judgment is not only a bar against further action directed against the Booth Company, but it is likewise a bar in favor of the stockholders of such company." The court pointed out the distinction between actions against stockholders in cases in which prior judgments had been rendered against the corporations, and those cases in which prior judgments had been rendered in favor of the corporations. The court held that a different rule prevails in the case of prior judgments against the corporations "because of the possibility of the stockholders being defrauded through collusion between a plaintiff and the officers of the corporation." The decision in the case from which quotation has just been made has been cited with approval in *Duell v. Metro-Goldwyn-Mayer Corporation*, *supra*, and *Armas v. City of Oakland*, *supra*.

The judgment is reversed.

We concur: CRAWL, P. J.; McCOMB, J.



24 Cal.App.2d 622

BURR v. DAMAREL.

Civ. 11652.

District Court of Appeal, Second District,
Division 2, California.

Jan. 31, 1938.

Hearing Denied by Supreme Court
March 31, 1938.

I. Automobiles 245(72)

Where a northbound pedestrian, seeing no eastbound automobile within one block, started across the easterly crosswalk of the intersection, and stopped between the eastbound and westbound car tracks to wait for westbound traffic, and, after looking to the

right for 25 or 30 seconds, looked to the left and saw defendant's eastbound automobile 45 feet away, and did not move until struck by such automobile immediately thereafter, the question of contributory negligence is for the jury.

2. Trial ⇨296(4)

An instruction that it is not contributory negligence to fail to look for danger where there is no reason to apprehend danger, though not to be commended, is not prejudicial, where the jury is fully instructed on contributory negligence.

3. Automobiles ⇨246(22)

An instruction to find for defendant, if plaintiff was struck by a third person's automobile and thrown against defendant's automobile, and if no act of defendant proximately contributed to cause plaintiff's injuries, is not objectionable as instructing the jury that they could not find for defendant if any act of his contributed to plaintiff's injuries.

4. Trial ⇨296(4)

In an action by a pedestrian struck by an automobile, an instruction that generally every person may presume that every other person will perform his duty and obey the law, though objectionable as omitting the qualification that the former must himself be exercising ordinary care and obeying the law, was not prejudicial, where the court gave full instructions on contributory negligence.

5. Trial ⇨296(3)

In an action by a pedestrian, five instructions on a motorist's duty regarding lookout and control, and the use of reasonable care to anticipate the presence of others, were not objectionable as ignoring the defendant motorist's theory, which was fully stated in other instructions.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Fred N. Burr against Jack Damarel, for personal injuries from an automobile accident. Judgment for plaintiff, and defendant appeals.

Affirmed.

Nourse, Betts & Jones and Paul Nourse, of Los Angeles, for appellant.

Joseph A. Spray, of Los Angeles (Charles P. Gould, of Los Angeles, of counsel), for respondent.

CRAIL, Presiding Justice.

This is an appeal from a judgment for damages for personal injuries from an automobile accident which occurred at the intersection of York boulevard and Avenue 51. York boulevard runs from east to west, Avenue 51 from north to south. The plaintiff was crossing York boulevard in the pedestrian crosswalk at the east side of Avenue 51. Going north, when he reached the south curb of York boulevard, he stopped and looked to his left and to his right. The traffic was heavy coming from the east, but there were no automobiles approaching the intersection from the west within one block. It was dark at the time, but the intersection was well lighted and all automobiles had their headlights lit. After stopping and looking at the curb, he left the curb, looking either straight ahead or to the east until he reached a point between the car tracks which run over York boulevard, at which point he stopped and looked to the right for a period of 25 or 30 seconds, and he then looked to the left and saw the defendant's car approaching from the west about 45 feet away. At this time the lane of automobiles which was proceeding west and which was nearest to the center of York boulevard was traveling with the left wheels of the automobiles about the center of the westbound car tracks. From that time until the accident plaintiff did not move and was immediately thereafter struck by the defendant's car.

[1] The first contention of the defendant is that plaintiff was guilty of negligence as a matter of law. This point is untenable. The plaintiff looked, and he used precautions for his own safety. Whether he was guilty of negligence is a question of fact to be determined by the fact-finder under all the facts and circumstances in evidence bearing upon the question. *Curcic v. Nelson Display Co.*, Cal. App., 64 P.2d 1153; *Pinello v. Taylor*, 128 Cal.App. 508, 17 P.2d 1039; *Filson v. Balkins*, 206 Cal. 209, 273 P. 578; *MacCorkell v. Williams*, 111 Cal.App. 572, 295 P. 879; *Crooks v. Doeg*, 4 Cal.App.2d 21, 40 P.2d 590.

[2] The defendant's second contention is that the court erred in giving to the jury the following instruction: "I instruct you that it is not contributory negligence to fail to look for danger where there is no reason to apprehend any danger." The court used the same language in the case of *Pinello v. Taylor*, 128 Cal.App. 508, 17 P.2d 1039.

The trial court fully and correctly instructed the jury on the question of contributory negligence, and, while the language above set out is not commended, we find no reversible error therein.

[3] The defendant next contends that the court erred in instructing the jury to the effect that they could *not* find for the defendant if any act or conduct of the defendant contributed to plaintiff's injuries. The instruction complained of reads as follows: "If you believe from a preponderance of the evidence that the plaintiff was struck down by an automobile other than that of the defendant, and was thrown into and against the defendant's car, and that any act or conduct of defendant did not contribute proximately to cause plaintiff's injuries, you will return a verdict in this case in favor of the defendant." It will be observed that it does not instruct the jurors to return a verdict in favor of the plaintiff, but does end with the words "you will return a verdict in this case in favor of the defendant." The court fully and fairly instructed the jury on the question of negligence.

[4] The defendant next contends that the court erred in giving an instruction that "the general rule is that every person has a right to presume that every other person will perform his duty and obey the law" because the instruction entirely leaves out the qualification of the rule which it purports to state, that before a person may assume that others will perform their duty or obey the law, they themselves must be exercising ordinary care and obeying the law. The instruction as given is subject to criticism. At the defendant's request the court fully instructed the jury on the subject of contributory negligence. The court also gave the following instruction: "I instruct you that a person lawfully and carefully using the street has a right to assume that all other persons using the street will also use ordinary care and caution." We are satisfied that there has not been a miscarriage of justice in this case and that we should not reverse the case by reason of this instruction. For other cases where the appellate courts have refused to reverse them because of the failure to include the element of contributory negligence in the above instruction see *Towne v. Godeau*, 70 Cal.App. 148, 232 P. 1010; *Menear v. Nutter*, 124 Cal.App. 29, 12 P.2d 138; *DeLanoy v. Grammatikos*, 126 Cal.App. 79, 14 P. 2d 542.

[5] The defendant next contends that the court erred in giving five instructions with regard to the duty of the operator of a vehicle to use reasonable care to anticipate the presence of other persons upon the street and to maintain a proper lookout and to keep his automobile under such control as will enable him to avoid a collision. The defendant does not criticize the instructions themselves, but says: "If these instructions were proper at all, under the evidence they should have been qualified so as to take into consideration defendant's theory of the case." All the law cannot be stated in any one instruction. The court fully instructed the jury as to the defendant's theory in other instructions, and we see no prejudicial error from the giving of these instructions.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.



24 Cal.App.2d 544

PEOPLE v. SWANSON.

Cr. 1585.

District Court of Appeal, Third District,
California.

Jan. 26, 1938.

1. Jury $\hookrightarrow$ 70(8, 11)

Where one deputy sheriff was witness against defendant, but another deputy sheriff selected and summoned special venire, jury panel was not subject to challenge on theory that as the deputy testifying was not qualified to select and summon special venire his principal, the sheriff, and also the other deputy were consequently disqualified. Pen.Code, § 1064.

2. Criminal law $\hookrightarrow$ 1144(8)

Where contrary did not appear in record, the legal presumption existed that defendant went to trial before an unbiased jury, and that he had not exhausted all his challenges.

3. Criminal law $\hookrightarrow$ 1144(13)

In determining whether evidence is sufficient to sustain conviction, appellate court must consider testimony in record in most favorable light for prosecution.

4. Criminal law ☞1159(2)

If there is sufficient evidence in record if believed by jury to support verdict, then, notwithstanding there may be strong preponderance of evidence in favor of appellant, the verdict of jury as judges of facts should be upheld.

5. Criminal law ☞747

Where almost every proposition advanced by the prosecution and all of testimony introduced by prosecution were controverted by testimony introduced by defendant, it was jury's duty to consider testimony and bring in such verdict as they found the testimony supported.

6. Criminal law ☞549

That there is a greater portion of transcript occupied by testimony given by defendant's witnesses does not establish that testimony introduced by prosecution was not sufficient to justify jury in believing defendant guilty beyond a reasonable doubt.

7. Criminal law ☞742(2)

In grand theft prosecution, whether accomplice's testimony as to taking of hogs was so improbable as to be ridiculous and unworthy of belief was question solely for consideration of jury.

8. Criminal law ☞304(2)

Appellate court could not take judicial notice that 18 hogs weighing somewhere slightly in excess of 120 pounds apiece could not be loaded into motortruck.

9. Criminal law ☞1158(1)

The action of trial court in refusing to grant new trial based upon affidavits is conclusive upon appellate court, unless it is shown that trial court abused its discretion.

10. Larceny ☞65

Evidence sustained conviction for grand theft of hogs.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Elmer Swanson was convicted of the crime of grand theft, and he appeals.

Affirmed.

E. H. Zion, of Modesto, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The appellant and one William Oliver were jointly charged by the district attorney with the crime of grand theft, in an information filed in the superior court of Merced county on June 11, 1937, and upon arraignment, entered a plea of not guilty. The trial took place thereafter, and on July 31, 1937, a verdict of guilty was rendered against the appellant. Thereafter, the appellant moved for a new trial, which was denied. Following the denial, on his motion for a new trial, the appellant was sentenced to San Quentin. William Oliver, on being arraigned, entered a plea of guilty.

Upon this appeal the appellant urges two grounds for reversal: First. That the court erred in denying appellant's challenge to the jury panel; second, that the evidence is insufficient to support the verdict.

[1] The record shows that a deputy sheriff of the county of Merced, by the name of Morse, was a witness against the appellant at a former trial, and likewise, was a witness against the appellant at the present trial. It appears from the record that the challenge interposed by the appellant to the jury panel was based upon the alleged prejudice against the appellant entertained by deputy sheriff Morse. The regular panel was exhausted and the court ordered a special venire. Section 1064 of the Penal Code provides that the officer summoning a special venire shall have the qualifications of a trial juror, and the challenge may be interposed to the panel by reason of any challenge that might be made against the Deputy Sheriff summoning the panel, that could be made against the juror. The record shows, however, that Deputy Sheriff Morse had nothing to do with selecting and summoning the special venire; that the special venire was selected and summoned by a deputy sheriff named Doyle. There appears to be no contention in the record that Doyle was disqualified. The challenge to the panel is based upon the theory that as Morse was disqualified, his principal, the sheriff, was also disqualified, and therefore that Doyle, another deputy sheriff, was disqualified to summon the special venire.

The cases cited by appellant in support of this theory do not bear out this con-

tention. The cases do hold that where the sheriff is disqualified, being the principal in the office, any deputy sheriff delegated by him to summon a special venire would likewise be disqualified, but the cases do not hold that because there is a disqualified deputy in the sheriff's office, that a qualified deputy, acting under a qualified principal, would thereby be disbarred from summoning a special venire.

[2] The record does not show the proceedings in the impanelment of the jury, and therefore it cannot be determined if the appellant exhausted all of his peremptory challenges. There being nothing in the record to the contrary, the legal presumption would follow that the appellant went to trial before an unbiased jury, and that the appellant did not exhaust all of his challenges.

The Attorney General cites a number of cases showing that no prejudice has been suffered by the appellant in the selection of the jury and that under section 4½ of article 6 of the Constitution no miscarriage of justice has been shown. The contention of the appellant in this particular seems to us so utterly lacking in merit that we refrain from extending this opinion by analyzing the cases cited by the Attorney General.

[3,4] Under the second ground alleged for reversal it is strongly contended by the appellant that the evidence is insufficient to support the verdict. In considering this question an appellate court is required to consider the testimony in the record in the most favorable light for the prosecution in this particular: If there is sufficient evidence in the record, if believed by the jury, to support the verdict, then, notwithstanding there may be a strong preponderance of the evidence in favor of the appellant, the verdict of the jury, as judges of the fact, should be upheld. *People v. Dukes*, 90 Cal.App. 657, 266 P. 558. To the same effect is the more recent case of *People v. Biggs*, Cal. App., 65 P.2d 75.

[5,6] Almost every proposition advanced by the prosecution and all of the testimony introduced by the prosecution were controverted by the testimony introduced by the appellant. Under such circumstances it was the duty of the jury to consider the testimony and bring in such verdict as they found the testimony to support. We may here state that because

there is a greater portion of the transcript occupied by testimony given by the appellant's witnesses, does not establish that the testimony introduced by the prosecution was not sufficient to justify the jury in believing the appellant guilty beyond a reasonable doubt.

The record shows that a man by the name of Glenn Gillette owned a certain band of Poland-China feeder hogs, which, on or about the 23d day of February, 1937, was being kept on a ranch known as and called the "Black Ranch" in Merced county. This band of hogs consisted of some 70 or 75 head; that shortly after the 23d day of February, 1937, it was discovered that 36 head of these hogs were missing. Upon examining the premises Gillette described automobile tracks leading from the vicinity of the hog corral through the orchard and out to a back road. The theft of these hogs resulted in the filing of the information upon which the prosecution based its cause against the appellant and William Oliver. The dwelling house on the Black ranch was not occupied at the time. Mr. Gillette was farming the Black ranch, and lived something over a mile distant. On the Black ranch he was keeping the band of hogs referred to.

The record shows a corral on the Black ranch and a loading chute from the corral, by means of which hogs could be loaded into trucks. An examination of this chute made shortly after the 23d day of February, 1937, showed it had been used very recently.

Oliver testified that three or four days prior to February 23, 1937, he and the appellant met at the former's ranch. The record shows in this particular that the appellant, a few days previously to the 23d of February, was looking for Oliver and inquired of one Delta Bates, on or about February 19, 1937, if she knew of a Mr. Oliver located around Merced. Upon her answering "no," the appellant stated that he believed he lived within two or three miles of Merced. Oliver further testified that at the meeting between himself and the appellant, the appellant asked him if he knew where there were any hogs, to which he replied that he did; that he and the appellant then drove over to the Black ranch and looked at the hogs; that while at the Black ranch he and the appellant discovered the possibility of getting the hogs, of being apprehended, of making the "get-away," of where the own-

ers lived, and the expected profits. It was agreed that Oliver would get the hogs as soon as he could and deliver them to the appellant. On the night of February 23, 1937, Oliver took his truck to the Black ranch, got a load of hogs and delivered the same to the appellant at his place in Turlock, transferring the hogs to the appellant's truck. After transferring the load he returned to the Black ranch and got a second load, which he likewise delivered to the appellant, arriving at the appellant's home shortly before daylight. Oliver further testified that appellant then prepared a bill of sale in his own favor, for the hogs, and Oliver signed it, using the fictitious name of "F. Barbano." The appellant admitted preparing the bill of sale, but denied that Oliver was the man who signed it, testifying that it was signed by a stranger from whom appellant had purchased the hogs. The handwriting expert from the state bureau of criminal identification testified that in his opinion Oliver signed the name "F. Barbano" to the bill of sale. Oliver testified further that after signing the bill of sale he went into Turlock and waited for the appellant. Appellant brought the hogs into Turlock in his truck. He met Oliver there and they proceeded to a public weighmaster and weighed the hogs. Frank B. Fowler, the public weighmaster, testified that he weighed a load of hogs for the appellant and Barbano on February 24, 1937. The hogs were then taken back to the appellant's place and unloaded and put into his corral.

The record further shows that on the same day, the 24th day of February, 1937, the appellant sold to one Anker, thirty-six head of feeder hogs. It may be here stated that the hogs taken from the Black ranch were called "feeder hogs." The color of the hogs taken from the Black ranch appears from the testimony to have been about the color of the hogs sold by the appellant to Anker.

The record further shows that the appellant, on the morning of the 24th of February, 1937, at about 8 o'clock, or a little later, borrowed \$270 from one William Sachau. The appellant, at the time of borrowing the money, told Sachau that he needed the money for the purpose of buying the hogs, and that he was in a hurry for it. The record further shows that the appellant, according to the testimony of Oliver, paid Oliver for his por-

tion of the profits realized on the hogs. Upon being questioned later the appellant first denied having purchased any Poland-China feeders around the 23d or 24th or 25th days of February, 1937. After being confronted with the fact that he had sold these hogs on the 24th to the Anker Meat Company, the appellant stated that he bought them up in the hills. Later, the appellant stated at the trial that he purchased the hogs from a man who had them loaded in a stalled truck on the highway near Turlock. It may be here stated that the record shows the hogs taken from the Black ranch were Poland-China feeders, and that the hogs sold to Anker corresponded with that breed of hogs.

[7,8] The appellant contends that Oliver's story as to the taking of the hogs was so improbable as to be ridiculous and unworthy of belief. This is something solely for the consideration of the jury. The record shows that Oliver took substantially the whole night in getting the two loads of hogs. The appellant further contends that the truck used by Oliver was so small that he could not load 18 hogs into the same. That again presents a question for the jury. We cannot take judicial notice, as contended by the appellant, that 18 hogs, weighing somewhere slightly in excess of 120 pounds apiece, could not be loaded in a truck of the size used by the witness Oliver.

The substance of the holding in *People v. Ralls*, Cal.App., 70 P.2d 265, and the cases there cited, is to the effect that an appellate court is not authorized to reject the testimony of a witness unless it is inherently improbable, and there is nothing in the record in this case which indicates to us that where hogs are in a corral, and there is a loading chute, that one man may not load a truck twice during the night, with approximately 18 hogs in each load.

The record shows a number of trips made here and there by the appellant on the morning of the 24th day of February, 1937, but the hogs in question were not delivered to Anker at all between 12 and 1 of that day, and there is no dispute of the fact that the appellant actually sold hogs to Anker between the hours mentioned on the day stated.

[9] Upon his motion for a new trial the appellant introduced several affidavits which were controverted by affidavits introduced by the prosecution. In his brief

the appellant calls our attention to the affidavits without specifying any particular reason why a new trial should be granted by reason of what is stated in the affidavits. For this reason we do not feel compelled to call attention to the specific facts testified to, either by the affiants for the appellant or affiants for the prosecution, further than to state that the action of the trial court in refusing to grant a new trial based upon the affidavits, is conclusive upon us, unless it is shown that the trial court abused its discretion. Nothing of that kind is presented for our consideration.

[10] Much testimony is introduced by the appellant to contradict the greater portion of the testimony which we have recited, as shown by the record. That, however, does not alone justify a reversal. If believed by the jury, what we have set forth is amply sufficient to justify the verdict.

The order and judgment are affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



24 Cal.App.2d 482

GERRITT v. FULLERTON UNION HIGH SCHOOL DIST. et al.

Civ. 2113.

District Court of Appeal, Fourth District,
California.

Jan. 21, 1938.

1. Pleading ⚡18

Less particularity in pleading is required where it appears from the nature of the allegations that the adverse parties must necessarily possess full information concerning the facts.

2. Pleading ⚡34(1)

Court must construe pleadings liberally as against general demurrer.

3. Pleading ⚡34(1)

In passing upon the sufficiency of pleading, its allegations must be liberally construed with a view to substantial justice between parties.

4. Pleading ⚡67

Allegations negating existence of defensive matters should not ordinarily be required as against a general demurrer.

5. Mandamus ⚡154(5)

A petition for mandate alleging that petitioner had taught certain classes in high school for necessary time to acquire tenure as a permanent teacher as to that part of work, as against a general demurrer, alleged facts, with allegations that trustees were attempting to evade tenure laws, if true, which would justify issuance of a writ directing school district to recognize and employ petitioner as a permanent teacher in high school district, at salary to which she would be entitled as such teacher.

6. Mandamus ⚡154(5)

Allegations of petition for writ of mandate directing school district to employ petitioner as permanent teacher in high school district, that petitioner held life certificate and that she had taught four years in high school and that she had taught continuously since 1931, sufficiently alleged that petitioner had a required certificate at time of employment as teacher, since it would not be presumed that school district violated statutes by employing petitioner without proper credentials.

7. Mandamus ⚡154(5)

Petition for writ of mandate directing school district to recognize and employ petitioner as permanent teacher in high school district, alleging that petitioner taught for more than four years in high school and that trustees employed her for school year 1931-32 and for each year of next succeeding five years and that since 1931 she had continuously taught in high school, sufficiently alleged, as against general demurrer, employment for full school years as regular teacher and not as substitute, since term "year" as used in petition would be interpreted as school year.

[Ed. Note.—For other definitions of "Year," see Words & Phrases.]

8. Schools and school districts ⚡133

As respects right to tenure as a permanent teacher, "permanent" or "probationary teachers" are under school laws employed for a year, while "substitute teachers" are employed from day to day.

9. Mandamus ⚡154(5)

A petition for writ of mandate directing school trustees to recognize and employ

petitioner as a permanent high school teacher, alleging that trustees purported to employ petitioner as teacher in junior college to evade high school tenure laws, as against general demurrer, presented question of fact which would require hearing upon the merits.

10. Schools and school districts ⇨135(4)

A formal contract of employment is not necessary to continue as a permanent teacher after requisite probationary service.

11. Mandamus ⇨154(5)

Under statute, petitioner seeking writ directing school district to employ petitioner as permanent teacher in high school district did not need to plead that agreement was in writing. Code Civ.Proc. § 447, as amended by St.1933, p. 2548.

12. Mandamus ⇨154(5)

Petition for writ of mandate directing school district to employ petitioner as permanent teacher in high school district which failed to allege that funds were available for payment of salary if petitioner was reinstated was not defective, since prayer was not for payment of certain sum but for writ requiring recognition of teacher as permanent teacher.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Petition by H. Ina Gerritt for a writ of mandate directed to Fullerton Union High School District and others to require defendants to employ and pay petitioner as a permanent teacher. From a judgment dismissing the petition, petitioner appeals.

Reversed, with directions.

Forgy, Reinhaus & Fogy and A. M. Bradley, all of Santa Ana, for appellant.

W. F. Menton, Dist. Atty., and Preston Turner, Asst. Dist. Atty., both of Santa Ana, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment dismissing a petition for a writ of mandate based upon an order sustaining a general demurrer to the petition, the petitioner having declined to amend within the ten days allowed for that purpose.

The petition, filed on June 15, 1937, alleges that the petitioner is a teacher by profession and holds a life certificate authorizing her to teach in secondary schools

in this state; that the individual respondents are the board of trustees of the named high school district and also are the trustees of a junior college district having the same boundaries as the high school district; that during the times in question a high school and a junior college have been maintained upon the same campus and the same person has acted as superintendent of both schools; that during that time the high school has had an average daily attendance in excess of 850 pupils and the junior college has had less than that number; that there has been no decrease in the number of pupils attending the high school and no particular kind of service therein has been discontinued; that the petitioner has taught the subjects of hygiene and foods in said high school for a period in excess of the past four years; that on July 28, 1931, the trustees of the high school district "employed the petitioner to render school service in a position requiring certification qualifications requiring her services for the school year 1931-32" at a named salary; that for the years 1932-33, 1933-34, 1934-35, 1935-36, and 1936-37 the trustees of this high school district and this junior college district employed the petitioner for the rendition of services requiring certification classifications to the said high school district and the said junior college district; that during the two years last named a certain salary had been paid; that continuously since the year 1931 the petitioner has taught in the school maintained by the high school district and has also taught classes in the school maintained by the junior college district; that she has at all times devoted in excess of three-fifths of the total time required of her by the superintendent of these two schools to the teaching of classes in the high school; that during all of these times she has served on high school committees and conducted high school extracurricular activities; that for the five years last mentioned the trustees of this high school district purported to employ the petitioner in the name of said junior college district for the purpose of nullifying and evading the tenure provisions of the school laws; that the respondent trustees at all meetings held sat as members of the board of trustees of both of these districts and at such meetings considered and directed the management and control of both schools; that these trustees for the purpose of nullifying and evading the provisions of the tenure act employed approximately forty teachers for work in the high school for the year

1936-37 in the name of the junior college district; that the high school district has paid the junior college district for all services rendered by the petitioner to the high school district from the school year 1932-33 to the present time; that on May 22, 1937, the petitioner notified the respondents that she would during the year 1937-38 be ready and available to render services as a teacher to this high school district and that she would expect compensation in accordance with such rights as she might have as a teacher with permanent tenure rights; and that on June 9, 1937, the respondents notified her that they would not employ her for the school year 1937-38 because of her claim to permanent tenure rights. The prayer is for an alternative writ directing the respondents to recognize and employ the petitioner as a permanent teacher in said high school district and to pay her the salary to which she is entitled as such a teacher.

[1-5] The sole question presented is as to the sufficiency of this petition. While some of the objections thereto raised by the respondents are technical in the extreme it must be conceded that the petition is far from a model and since it is apparent that it could have been so amended as to meet most, if not all, of the objections raised, it is hard to understand why the opportunity given for that purpose was not used. However, it should be borne in mind that less particularity in such a pleading is required where it appears from the nature of the allegations that the adverse parties must necessarily possess full information concerning the facts. *Goldstein v. Healy*, 187 Cal. 206, 201 P. 462. It should also be borne in mind in considering the petition as against a general demurrer that we are enjoined by statute to construe pleadings liberally, that in passing upon the sufficiency of a pleading its allegations must be liberally construed with a view to substantial justice between the parties, and that allegations negating the existence of defensive matters should not ordinarily be required. *Mix v. Yoakum*, 200 Cal. 681, 254 P. 557; *Terry Trading Corporation v. Barsky*, 210 Cal. 428, 292 P. 474.

With these rules in mind it must be held that this petition, in spite of its defects, alleges facts which, if true, would justify the issuance of a writ. As against a general demurrer it sufficiently appears that the petitioner had taught certain classes in this high school for the necessary time to ac-

quire tenure as to that part of her work. While apparently she had not acquired tenure as to her other work, in the junior college, that fact would not prevent the issuance of a writ covering a portion of her employment. A further consideration is that the allegations setting forth what amounts, in effect, to a fraudulent attempt to evade and defeat the purposes of the tenure law, the truth of which allegations must be assumed for the present purposes, present a situation which, if true, should not be upheld by the courts (*Mitchell v. Board of Trustees*, 5 Cal.App.2d 64, 42 P.2d 397) and which in the interest of justice require us to go as far as the law will permit in sustaining the sufficiency of the petition to the end that the important question thus raised may be determined on its merits.

[6] The respondents contend that it is not sufficiently alleged that the petitioner had the required certificate at the time of her alleged employment as a teacher and at the time of her demand for reinstatement, citing *Clark v. Board of Education*, 64 Cal.App. 757, 222 P. 854. While one ground of the decision in that case supports the contention here made there were other defects in the petition therein considered, the effect of which had an important bearing on the result. A contrary conclusion was reached by the same court in *Chambers v. Davis*, 131 Cal.App. 500, 22 P.2d 27, the reasoning of which is applicable here. The allegation that the petitioner holds a life certificate should be taken in connection with the other allegations that she has taught for more than four years in this high school, that she was employed by the respondents for the years 1931 to 1937, inclusive, for the rendition of services requiring certification qualifications, and that she had taught continuously since 1931, and it is not to be presumed that the respondents violated the statutes by employing her for several successive years without ascertaining that she held proper credentials which were duly registered and filed.

The respondents further contend that the petition does not sufficiently allege that the petitioner was employed by this high school district for the requisite length of time and for the amount of service necessary to establish tenure. It is argued that it cannot be told from the allegations of the petition whether she was employed as a probationary employee or a substitute teacher, whether she was employed for one day each week or for the entire school year,

whether she served as a teacher or other employee, whether she served for the complete years in question or only for a small portion of each of those years, whether she was employed for full time or part time, whether she served three-fifths of all of the time during each year or merely three-fifths of the time required of her by the superintendent, whether she served at least 75 per cent. of the number of days the school was maintained each year or merely three-fifths of some other unnamed time. It is further argued that all other allegations of the petition are controlled by the allegation that she was employed by the trustees of the high school district in the name of the junior college district and that this conclusively shows that if she was legally employed at all she was employed by the junior college district.

[7-9] Permanent or probationary teachers are, under the school laws, employed for a year, while substitute teachers are employed from day to day (*Hogsett v. Beverly Hills School District*, 11 Cal.App.2d 328, 53 P.2d 1009), and the term "year" as used in this petition must be interpreted as a school year. *Williams v. Bagnelle*, 138 Cal. 699, 72 P. 408. It is alleged that the petitioner taught for more than four years in this high school; that the trustees employed her in July, 1931, for the school year 1931-32; that for each of the next succeeding five years she was employed by the trustees of each of these schools; and that she had since 1931 taught continuously in the high school. As against a general demurrer these allegations sufficiently set forth an employment for full school years, an employment as a regular teacher and not as a substitute teacher, and the performance of such services for the respective school years. While the pleading could be improved upon, it sufficiently appears, as against a general demurrer, that such employment and service was for more than 75 per cent. of the days during which the school was maintained during the respective school years, and it is not necessarily to be inferred from the language used that the employment was merely for three-fifths of the total time regardless of the number of days involved, or merely for three-fifths of such time as the superintendent might require of her. The plain meaning of the petition is that she taught continuously during the years named, which implies that she taught for more than 75 per cent. of the days in such years, and that more than three-fifths of such continuous teaching was

devoted to classes in this high school. The allegation that she was employed by the trustees of the high school district with the allegation that these trustees purported to employ her in the name of the junior college district is far from sufficient to conclusively show that she was employed only by the junior college district, and presents a question which particularly calls for a hearing on the merits and a determination of the real facts.

[10, 11] The respondents next argue that the petition is insufficient because it fails to allege that the contract of employment was in writing. It was held in *Martin v. Fisher*, 108 Cal.App. 34, 291 P. 276, that a formal contract of employment was not necessary and that a right to continue as a permanent teacher accrues after the requisite probationary service. Since the amendment of section 447 of the Code of Civil Procedure in 1933, St.1933, p. 2548, the plaintiff is not required to plead the fact that his agreement was in writing. The allegations that the petitioner here was employed by the respondent board of trustees during the preceding five years and that this board purported to employ her in the name of the junior college district for the purpose of evading the tenure act furnishes an additional reason why the failure to plead a written contract with the respondent board should not necessarily be held fatal.

[12] The last alleged defect of this petition which requires consideration is that it fails to allege that funds are available for the payment of the salary if the petitioner is reinstated. While it has been stated in certain cases that the availability of funds should be alleged, as well as proved, the question suggested could not be conclusive here and need not be considered, in view of the pleading which is now before us. Regardless of other considerations the prayer here was not for a writ requiring the payment of a certain sum but for a writ requiring the recognition of the petitioner as a permanent teacher and that she be paid the salary to which she is entitled as such a teacher. Under the circumstances here appearing the petitioner might be entitled to a writ which, under the prayer, could take such form as was made necessary by the evidence developed.

For the reasons given the judgment is reversed, with directions to overrule the demurrer.

I concur: MARKS, J.

24 Cal.App.2d 559

**PAPENFUS v. WEBB PRODUCTS CO.,
Inc., et al.
Civ. 1659.**

District Court of Appeal, Fourth District,
California.

Jan. 26, 1938.

1. Corporations ⇨519(1)

One transferring property to corporation in exchange for other property and stock, issued to him in violation of corporation's permit, cannot recover damages for constructive fraud in amount of difference between value of property transferred and that received, in absence of evidence as to value of what he received aside from such stock. Civ.Code, § 3343, as added by St.1935, p. 1612.

2. Contracts ⇨267

Generally, contract will not be rescinded, where it would be inequitable.

3. Contracts ⇨273

A party may not rescind contract in part while continuing to use and enjoy part of benefits received thereunder.

4. Corporations ⇨80(10)

One failing to restore, or offer to restore, all that he received under contract for transfer of his tangible assets, with his formulæ and good will of his business, to corporation in exchange for stock therein and employment as its production manager, and continuing to act as such manager and director and stockholder of corporation and to assert right to participate in its earnings for considerable time after filing suit to rescind contract, had no right to such relief on ground of constructive fraud in issuing stock to him in violation of corporation's permit.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by D. E. Papenfus against the Webb Products Company, Inc., and others for rescission of a contract and recovery of property delivered to defendants pursuant thereto or value of such property. Judgment for defendants, and plaintiff appeals.

Affirmed.

Carl B. Hilliard, of San Bernardino, for appellant.

Wilson & Coughlin, of San Bernardino, for respondents.

CAL.REP.75-76 P.2d-11

BARNARD, Presiding Justice.

This is an action for rescission in which the plaintiff sought to recover certain property delivered to the defendants in pursuance of a contract, or the value thereof in the event a redelivery could not be made.

In 1926 the individual defendants, as co-partners, were engaged in the business of manufacturing cement and adhesive products in the city of San Bernardino. They formed a corporation for the purpose of taking over this business, and early in 1927 a permit was issued permitting the corporation to sell and issue 120 shares of stock to its incorporators for cash. Shortly thereafter the assets of the partnership were transferred to the corporation, and in consideration thereof 200 shares were issued to Corkham, 450 shares to Webb, and 25 shares to Webb's brother. Although this and the subsequent issue of stock in exchange for property was in violation of the permit, it is conceded that the incorporators were unaware of this fact and that there was no intentional fraud or bad faith on their part.

The plaintiff was engaged in the business of manufacturing wood putties and like products under secret formulæ in the city of Los Angeles, which were marketed under a certain trade-name. Under an agreement dated June 27, 1931, these two businesses were combined, the plaintiff transferred his tangible assets together with his formulæ and the good will of his business to the corporation, 100 shares of its stock was issued to him, he entered the employ of the corporation and became its production manager, and the combined business was conducted without trouble for more than four years. On October 1, 1935, the plaintiff discovered that his stock, as well as that of the other stockholders, was not issued in conformance with the permit, and on November 4, 1935, he brought this action for a rescission on the theory that there had been a constructive fraud since the stock issued to him was void. Judgment was for the defendants, and the plaintiff has appealed.

The questions presented by the appellant are whether the issuance of such void stock is such a constructive fraud as will entitle the aggrieved party to rescind and recover damages, whether the aggrieved party may by his conduct be estopped from questioning the validity of such stock, and whether the judgment is supported by the evidence. A number of findings are specifically at-

tacked which need not be considered, since they are immaterial in any event. It may be conceded that the issuance of stock under these conditions is a constructive fraud and that a contract exchanging property for such stock may, under proper circumstances, be rescinded. The real issues here are somewhat different and appellant's contentions are in fact based upon the theory that the contract, as a result of which the two businesses were combined, was divisible, that his exchange of certain assets for stock in this corporation had nothing to do with other portions of the contract, and that there was nothing for him to return or offer to return since he received nothing of value.

It is at once apparent that the circumstances here are quite unlike those involved in the ordinary rescission action. While a constructive fraud may exist, there was no actual fraud, and the individual respondents are in a position similar to that occupied by the appellant, having also transferred the assets of their business to the corporation in exchange for void stock. The two businesses were in fact combined, the assets of both were intermingled, the new business was carried on for some years, and the corporation apparently holds the title to both sets of properties in trust for the respective parties.

The contract under which this situation was brought about was entered into between the appellant as first party and the corporation respondent as second party. It recites that the first party has for some time conducted a certain business, that the second party has for some time conducted another business, and that the first party desires to transfer the assets of his business to the second party "upon the terms and conditions herein set forth." By the terms which follow it is agreed that, in consideration of the issuance to the first party of 100 shares of stock of the second party, the first party will transfer to the second party all assets of the business theretofore conducted by him, including all formulæ and prescriptions for the making of products theretofore used by him; that, in consideration of the premises, the second party agrees upon receipt of said assets to issue to the first party 100 shares of its stock; that the first party will pay all debts theretofore contracted by him and turn over all sums received by reason of sales made by him after the taking of an inventory on a certain date; that the first party from and after July 1, 1931, shall de-

vote all of his time and service as an employee of the second party and shall receive a monthly salary of \$200 with further adjustment in salary to be made by the board of directors as conditions may warrant; that the first party shall not be discharged without just cause or lawful reason; that the first party shall not engage in a similar business or divulge to others any of the formulæ or prescriptions then developed or which might thereafter be developed; that both parties shall use their efforts to prevent the disclosure to others of any of the formulæ or prescriptions thereby conveyed or then owned by the second party; and that the first party shall become a member of the board of directors of the second party.

The subsequent action of the parties throws some light on the meaning and intent of this contract. Immediately after its execution, the appellant became production manager of the combined business, overseeing the mixing of the various formulæ, and looking after the manufacture of goods to be sold. He continued these activities, as well as the exercise of his rights as a director and stockholder of the corporation, not only during the period prior to his discovery of the fact that the issuance of the stock was not in accordance with the permit but thereafter and until more than a month after this action was filed. The suit was filed on November 4, 1935, and he continued as production manager until December 6, 1935. He participated as a stockholder in five meetings held in December, 1935, the last one being on December 30th. He participated as a stockholder at the stockholders' meeting held on January 14, 1936, taking an active part in the passing of motions. At the end of each year surplus earnings had been divided among the supposed stockholders. At the end of 1933 the appellant received from such surplus earnings \$250, at the end of 1934 he received \$825, and on February 19, 1936, he demanded his share of the surplus earnings for 1935.

We think it sufficiently appears that there were not two separate agreements between these parties, one providing for the exchange of certain assets for stock and another independent agreement providing for the employment of the appellant. There was one agreement, the essential purpose of which was to combine these two businesses and carry them on as one business, with the appellant taking an important part therein. All that was done

by either of the parties to this action was done in consideration of what should be done by the other party under the terms of this agreement. The new business was then conducted for a considerable period, all of the parties contributing more than the assets, tangible or otherwise, which had been put in, and all of them receiving direct benefits which arose from the contract in its entirety.

[1] It is conceded that the assets transferred by the appellant in exchange for the stock could not be returned in kind because the tangible assets had been intermingled with similar properties and in part used up and destroyed, and because the secret formulæ had in part lost their value by being used in the other business. The appellant argues, however, that he is entitled to a return of the value of the assets which he exchanged for the stock. The difficulties in the situation are illustrated by the fact that the appellant, although he pleaded and attempted to prove a rescission and stated to the trial court that the action was one for a rescission, has argued on this appeal that the action is one for damages and states that the measure of damages in such a case as this is that prescribed by section 3343 of the Civil Code, as added by St.1935, p. 1612, that is, the difference between the value of that with which he parted and the value of that which he received. It may be observed that even on this theory there is no evidence as to the amount of damages suffered by the appellant. There is some testimony as to the value of the assets transferred by him to the corporation, but there is no evidence as to the value of what he received from the corporation aside from the stock certificate, which he says is worthless.

[2-4] It is a general rule that a rescission will not be enforced where it would be inequitable to do so. This appears to be the case here, where all of the parties had proceeded for years in the honest belief that they held stock which they later discovered to be invalid. While the stock itself was worthless, each had some kind of an interest in the property held by the corporation which they had used in common. It would be a practical impossibility to restore either of the parties to the position previously occupied. The appellant failed to restore, or offer to restore, all that he had received, including not only his in-

terest in the combined business and his share of extra earnings during certain years, but the knowledge of formulas and trade secrets formerly used by the respondents and which he had learned through his position as production manager. He further attempted to rescind in part while continuing to use and enjoy part of the benefits he had received which, under familiar rules, may not be done. He served no notice of rescission, and conceding, as argued, that his failure in this respect was excused because it would have served no useful purpose in this particular case, it must be conceded that, if he rescinded at all, he did so at or before the time he filed suit. However, after that time he not only continued to act as production manager, drawing a salary therefor, but continued to accept and demand benefits under the contract, continued to act as a director and as a stockholder of the corporation, and continued to assert his right to participate in the earnings of the business even for a considerable period after he had filed suit. Regardless of what other remedies might have been open to him, the appellant did not establish a right to relief in this particular action, and the court correctly entered judgment against him.

The judgment is affirmed.

I concur: MARKS, J.



24 Cal.App.2d 616

PEOPLE v. JAMES.

Cr. 3045.

District Court of Appeal, Second District,
Division 2, California.

Jan. 29, 1938.

1. Forgery ⚡44

Evidence sustained conviction for forgery.

2. Criminal law ⚡404(5), 491(1)

Evidence respecting defendant's handwriting may be given by comparison made by witness or jury with writing admitted by defendant to be genuine. Code Civ.Proc. § 1944.

3. Criminal law $\Rightarrow$ 491(2)

In prosecution for forgery, where witness testified that accused had admitted forging signature on check, check was properly received in evidence and used by handwriting experts as an exemplar in comparison with signatures on other checks allegedly forged by accused. Code Civ.Proc. § 1944.

4. Criminal law $\Rightarrow$ 941(1)

Newly discovered evidence which is merely cumulative in character is not of itself sufficient grounds for granting a new trial.

5. Criminal law $\Rightarrow$ 941(2)

Where accused, who was convicted of forgery, had denied forging of signature on a check and on motion for new trial on ground of newly discovered evidence accused offered affidavits of person whose signature appeared on check, which stated that such person, and not accused, had signed the check, motion was properly denied, since such evidence was merely cumulative.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

William F. James was convicted of forgery, and he appeals.

Affirmed.

Franklin B. MacCarthy, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palestine, Deputy Atty. Gen., for the People.

McCOMB, Justice.

Defendant was convicted after trial by jury on seven counts of forgery. This appeal is from the order denying his motion for a new trial.

Viewing the evidence most favorable to the respondent, the essential facts are:

On seven different occasions in the months of February and May, 1937, defendant forged and cashed checks at various banks in the city of Los Angeles. During the course of the trial, after a witness testified that defendant admitted forging Ellen F. Huston's name to a check, the check was received in evidence as People's Exhibit 10 and used by handwriting experts as an exemplar in comparison with the signatures on the seven checks defendant was charged with having forged. On his motion for a new trial defendant filed an affidavit of Ellen F. Huston that she

and not defendant had signed her name to People's Exhibit 10.

Defendant relies for reversal of the judgment on the following propositions:

First. The evidence is insufficient to sustain the judgment.

Second. The trial court committed prejudicial error in receiving in evidence People's Exhibit 10 and permitting it to be used as an exemplar of defendant's handwriting.

Third. The trial court abused its discretion in refusing to grant defendant's motion for a new trial on the ground of newly discovered evidence.

[1] Defendant's first proposition is untenable. We have examined the record and are of the opinion there was substantial evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to sustain the finding of facts hereinabove mentioned, and each and every other material finding of fact upon which the verdict of guilty was predicated.

Thatch v. Livingston, 13 Cal.App.2d 202, 56 P.2d 549; People v. Groves, 9 Cal.App. 2d 317, 321, 49 P.2d 888, 50 P.2d 813; Leavens v. Pinkham & McKevitt, 164 Cal. 242, 245, 128 P. 399.

[2, 3] Defendant's second proposition is likewise untenable. The law is settled in this jurisdiction that evidence respecting a defendant's handwriting may be given by a comparison made by a witness or the jury with a writing admitted by defendant to be genuine. Section 1944, Code Civ.Proc. In the instant case, Officer Page testified that shortly after defendant's arrest a check, People's Exhibit 10, supra, was displayed to defendant, who admitted that he had written it. It is evident that under the rule of law above stated the trial court properly received in evidence People's Exhibit 10 and permitted it to be used by handwriting experts as an exemplar of defendant's handwriting in comparison with the signatures on the seven checks defendant was charged with having forged.

[4, 5] Defendant's final proposition is also without merit. The law is settled that newly discovered evidence which is merely cumulative in character is not of itself sufficient grounds for granting a new trial. People v. Barr, 8 Cal.App.2d 495, 496, 47 P.2d 1070; People v. Loveless, 140 Cal.App. 291, 294, 35 P.2d 574.

In the instant case, defendant took the witness stand and denied that he had

written People's Exhibit 10. Therefore, the testimony of Ellen F. Huston, as set forth in her affidavit on the motion for new trial, was merely cumulative evidence, and the trial court did not abuse its discretion in denying the motion for a new trial.

For the foregoing reasons, the order appealed from is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



24 Cal.App.2d 528

PELLAS v. OCEAN ACCIDENT & GUARANTEE CORPORATION, Limited.

Civ. 10521.

District Court of Appeal, First District,
Division 2, California.

Jan. 25, 1938.

Rehearing Denied Feb. 24, 1938.

Hearing Denied by Supreme Court
March 25, 1938.

1. Removal of causes ⇨43

Where, at time action was commenced in state court, plaintiff and defendant were both aliens, and at trial it appeared that long after filing of action, plaintiff became a naturalized citizen, defendant's petition thereafter for removal to the United States District Court, based solely on diversity of citizenship, was properly denied.

2. Removal of causes ⇨43

A litigant is not entitled to a removal of a cause to the United States District Court, on ground of diversity of citizenship, unless diversity existed, not only at time petition for removal was filed, but also at time of commencement of the action.

3. Insurance ⇨332(1)

Where fidelity bond provided that upon assured's discovery of any dishonest act on part of correspondent bond terminated as to any subsequent purchases through such correspondent, assured's knowledge of correspondent's delay in performance and of correspondent's financial embarrassment did not constitute "discovery of a dishonest act" within meaning of the bond.

[Ed. Note.—For other definitions of "Dishonest Act," see Words & Phrases.]

4. Insurance ⇨646(3½)

In action on fidelity bond which provided that upon assured's discovery of any dis-

honest act on part of correspondent bond terminated as to any subsequent purchases through such correspondent, burden was on surety to prove assured's discovery of dishonest act.

5. Insurance ⇨332(1)

Where fidelity bond provided that if assured settled any loss which was basis of claim under the bond, without first securing surety's consent to such settlement with correspondent, bond would become void from beginning as to that correspondent, assured's taking of collateral security from correspondent was not a settlement so as to exonerate surety from liability on bond.

6. Insurance ⇨622(1)

Where fidelity bond provided that proceedings for recovery under bond must be brought within six months after affirmative proof of loss under oath, together with full particulars of loss, has been filed with surety, letter written by assured to surety more than six months before action was commenced, which asked surety to send assured the usual forms of proof of loss so that assured could file proof upon learning extent of loss, and asking surety to inform assured definitely as to time limit within which proof of loss had to be filed, was not a "proof of loss," so as to bar assured's action on bond.

[Ed. Note.—For other definitions of "Proof of Loss," see Words & Phrases.]

7. Insurance ⇨598

Where assured recovered of surety on fidelity bond for loss sustained through dishonesty of correspondent in assured's purchase of coffee from correspondent, and action was commenced on June 28, interest on judgment was properly allowed from January 7, the date of filing of proof of loss, since amount of assured's damage was at least capable of being made certain on that date. Civ.Code, § 3287.

8. Insurance ⇨598

Where assured recovered of surety on fidelity bond for loss sustained through dishonesty of correspondent in assured's purchase of coffee from correspondent, fact that assured had taken and realized on security from correspondent before proof of loss was filed did not affect assured's right to interest on judgment against surety from date of filing of proof of loss.

9. Insurance ⇨598

Where assured recovered of surety on fidelity bond for loss sustained through dis-

honesty of correspondent in assured's purchase of coffee from correspondent, provision of bond that actions thereon could not be brought until three months had elapsed after filing of proof of loss did not affect assured's right to interest on judgment against surety from date of filing of proof of loss, since provision did not defer date on which payment was due.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by S. F. Pellas against the Ocean Accident & Guarantee Corporation, Limited, to recover on a fidelity bond issued by defendant to plaintiff. Judgment for plaintiff for \$20,000, and defendant appeals.

Affirmed.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellant.

Brobeck, Phleger & Harrison, of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff sought to recover upon a fidelity bond issued by defendant. The cause was tried by the court sitting without a jury, and, from a judgment in favor of plaintiff for \$20,000 and interest, defendant appeals.

The evidence appears to be without conflict in all of its material aspects. Plaintiff was an importer of coffee with his offices in San Francisco. He bought large quantities of coffee during 1931 and 1932 from one Hoyos, an exporter of coffee at Manizales, Colombia. Prior to the issuance of the bond by defendant, plaintiff had made inquiry through banks concerning the financial standing and reputation of Hoyos and had received excellent reports. The bond was dated December 9, 1931, and defendant thereby agreed to indemnify plaintiff "against all such losses or damage as the Assured may sustain through, by reason of, growing out of, or in connection with the purchase by the Assured of goods, merchandise or commodities from or through any person, firm or corporation named in the schedule forming part of this bond, as a result of or through fraud, dishonesty, embezzlement or any other criminal or wrongful act of any such person, firm or corporation, or agent, officer, or employee thereof (hereinafter termed 'correspondent') while the bond is in force." The

bond was in the total sum of \$145,000 and the total premium thereon was \$1,957.50. The schedule in said bond named four correspondents and specified the coverage with respect to each. The amount of coverage with respect to Hoyos was the sum of \$20,000.

Thereafter, plaintiff made purchases of coffee from Hoyos in each month from December, 1931, to and including September, 1932. Payments were made for such purchases either upon railroad receipts or mill receipts. It appears that there were three methods in vogue for the payment for purchases from correspondents. One of the methods is not involved here, but it consisted of payment in advance without documents. Under this method, the seller (or correspondent) was authorized to draw upon the buyer at once; the drafts being payable at the time of future shipment, either 30, 60, or 90 days thereafter. Another method was by payment upon delivery of a railroad receipt. Under this method, the seller did not receive payment until the coffee had been actually shipped to the purchaser. Such payment was received at a local bank upon presentation of the railroad receipt. The third method was by payment on delivery of a mill receipt. Under this method the seller received payment at a local bank upon presentation of a mill receipt, issued by the administrator of a mill, showing that coffee was on hand for the account of the purchaser and would be shipped within 30 days after drying and processing.

The first and third methods were advantageous to the seller as payment was received prior to shipment. The railroad receipt method was advantageous to the purchaser as the time of payment was deferred until shipment and the seller's obligations were completed before payment. It may be stated that, under the mill receipt method, the seller's obligations were not terminated at the time of payment as he was thereafter obligated to pay for milling the coffee, preparing it for export, packing it, marking it and shipping it through a shipping agent designated by the purchaser. There was correspondence between plaintiff and Hoyos regarding the method to be used for payment and it was finally agreed between them that one-half of the payments should be made, upon railroad receipts and one-half should be made upon mill receipts. This agreement was followed out. The evidence shows that the mill receipt method was a

customary method of doing business and that most of plaintiff's business with his several correspondents was done under this method.

During 1932, there was some delay in the shipment of coffee by Hoyos in certain cases where payment had been made upon mill receipts. There was a great deal of correspondence between plaintiff and Hoyos and between plaintiff and the Banco de Colombia at Manizales. This correspondence indicated that Hoyos was having financial difficulties owing to delay in collecting his accounts receivable. Plaintiff became alarmed in October, 1932, and ordered the Banco de Colombia to have an auditor make an investigation. This was done and plaintiff received a letter from the bank on October 31, 1932, which indicated the probability of a serious shortage in the amount of coffee in transit and in the mill to satisfy the mill receipts upon which payments had been previously made. Plaintiff notified defendant on that day and subsequently filed formal proof of loss after it had been definitely determined that a shortage existed and the exact extent thereof.

The trial court made findings with respect to the wrongful acts of Hoyos and the resulting loss to plaintiff in a sum exceeding \$20,000. None of these findings are attacked on this appeal. It appears from the findings and the evidence in support thereof that Hoyos had leased a mill from its owner, that he had caused spurious mill receipts to be issued, that he had not sufficient coffee in said mill to satisfy said mill receipts, and that he had finally withdrawn all coffee from the mill and converted it to his own use.

[1,2] Appellant first contends that "the trial court committed prejudicial error in refusing, during the course of the trial, to transfer the cause to the United States District Court." In this connection, further facts should be stated. Shortly after the filing of the action, appellant petitioned for removal on the ground of diversity of citizenship, claiming that it was a citizen of Great Britain and that respondent was a citizen of California. An order of removal was made, but respondent thereafter filed an affidavit in the United States District Court showing that he was an alien and the cause was remanded to the state court. During the cross-examination of respondent upon the trial of the cause, it appeared that long after the filing of the action and the entry of the order remand-

ing the cause, he had become a naturalized citizen of the United States. Appellant thereupon filed a new petition for removal, which was denied by the trial court and it is to this ruling that appellant's contention is directed. We find no error in the trial court's ruling. The petition was based solely upon diversity of citizenship, and it is well settled that appellant was not entitled to such removal unless the required diversity existed, not only at the time the petition was filed, but also at the time of the commencement of the action. *Gibson v. Bruce*, 108 U.S. 561, 2 S.Ct. 873, 27 L.Ed. 825; *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U.S. 379, 4 S.Ct. 510, 28 L.Ed. 462; *Houston, etc., R. Co. v. Shirley*, 111 U.S. 358, 4 S.Ct. 472, 28 L.Ed. 455; *Akers v. Akers*, 117 U.S. 197, 6 S.Ct. 669, 29 L.Ed. 888; *Stevens v. Nichols*, 130 U.S. 230, 9 S.Ct. 518, 32 L. Ed. 914; *Jackson v. Allen*, 132 U.S. 27, 10 S.Ct. 9, 33 L.Ed. 249; *Mattingly v. Northwestern Virginia Railroad Co.*, 158 U.S. 53, 15 S.Ct. 725, 39 L.Ed. 894. It is conceded here that the required diversity did not exist at the time the action was commenced. Appellant cites and relies upon *Fritzen v. Boatmen's Bank*, 212 U.S. 364, 29 S.Ct. 366, 53 L.Ed. 551, *Powers v. Chesapeake & Ohio Railway Co.*, 169 U.S. 92, 18 S.Ct. 264, 42 L.Ed. 673, and the Removal Cases, 100 U.S. 457, 25 L. Ed. 593, but we find none of these in point. Under the rule of the authorities first above mentioned, no right to removal came into existence in the present case at any time and the cases dealing solely with the question of the time for exercising a right of removal have no application here. See *Anaconda Copper Mining Co. v. Butte-Balaklava Copper Co.*, D.C., 200 F. 808, 809.

Appellant further contends that "the judgment lacks evidentiary support for the reason that the bond terminated before plaintiff suffered any loss or damage." In our opinion, this contention is without merit. It is based upon the following provision of the bond: "Upon the discovery by the Assured of any dishonest act on the part of any correspondent, this bond shall terminate, without any action on the part of the Surety, as to any subsequent purchases by or through such correspondent."

[3] Appellant sought to raise the issue of termination by alleging that long prior to October 31, 1932, respondent discovered

facts which indicated the dishonesty of Hoyos. The trial court found that on October 31, 1932, and not before that time, respondent first discovered facts which indicated the dishonesty of Hoyos and that he did not discover any dishonest act at any time prior thereto. No further transactions were thereafter had with Hoyos. The foregoing findings of the trial court are amply sustained by the evidence and are conclusive on the defense of termination. Appellant sets out at length the correspondence from which it appears that respondent had previously learned of the delay in performance by Hoyos and also of Hoyos' financial embarrassment. But neither knowledge of delay nor knowledge of financial embarrassment constituted "discovery of a dishonest act." The obtaining of the mill receipts did not terminate the obligations of Hoyos under the mill receipt method above described, and it was entirely possible that his financial embarrassment accounted for the delay in shipments by making it impossible for him to meet his further obligations which required further expenditures by him before the coffee, represented by such receipts, could be shipped to respondent. But assuming, without deciding, that the correspondence and other evidence might have given rise to a suspicion of dishonesty, we are of the opinion that such grounds for suspicion did not constitute "discovery of a dishonest act" within the meaning of the bond. *Pacific Coast A. Bureau v. Indemnity Insurance Co.*, 115 Cal.App. 583, 2 P.2d 218; see, also, *Andrews v. Minter Coal & Coke Co.*, 90 Ind.App. 320, 168 N.E. 869; *Outlook Farmers' Elevator Co. v. American Surety Co.*, 70 Mont. 8, 223 P. 905; *Gilmour v. Standard Surety & Casualty Co.*, Mass., 197 N.E. 673.

[4] Under the foregoing heading, appellant argues that "the entire case of plaintiff is bottomed on the proposition that he did not believe and had no reason to believe that Hoyos managed and controlled the mill which issued the receipts forming the basis of plaintiff's claim." Respondent disputes this assertion claiming that the question was not material, and also pointing to the trial court's findings on the subject. We need not discuss its materiality, for if it was material, it became so only under appellant's affirmative defense of termination. The burden of proof was upon appellant to prove this defense, and the trial court was justified

in concluding that it had not sustained that burden. The trial court's findings were adverse to appellant on the above-mentioned proposition as well as upon all others having to do with the issue of termination, and a review of the record shows that the evidence was ample to sustain these findings.

Appellant further contends that "the judgment lacks evidentiary support for the reason that plaintiff did not give timely notice of discovery to defendant or file timely proof of loss." This contention is closely related to the contention previously discussed, for it is based upon appellant's claim that respondent discovered dishonesty on the part of Hoyos prior to October 31, 1932. The bond provided: "Upon the personal discovery by the Assured of any dishonest act on the part of any Correspondent the Assured shall, at the earliest practicable moment, and at all events not later than five days after such discovery, give written notice thereof addressed to the Surety at its Pacific Coast Branch. Affirmative proof of loss under oath, together with full particulars of such loss, shall be filed with the Surety at its Pacific Coast Branch within three months after such discovery." It is unnecessary to discuss this contention further, for it is apparently conceded that if the dishonesty of Hoyos was not discovered until October 31, 1932, the notice of discovery was given and the proof of loss was filed within the time provided by the bond. As heretofore stated, the trial court found that the dishonesty of Hoyos was not discovered until October 31, 1932, and that finding is sustained by the evidence.

It is next contended that "the judgment lacks evidentiary support for the reason that plaintiff's loss was caused by his own wilful acts." It is somewhat difficult to ascertain appellant's precise claim under this heading. Appellant again claims that the evidence was insufficient to sustain certain findings heretofore discussed. Appellant then relates certain facts, claiming that said facts show that respondent "was clearly guilty of wilful exposure, gross negligence and misconduct." All of the findings on issues bearing any relation to these subjects were adverse to appellant and were sustained by the evidence. Furthermore, the evidence was sufficient to sustain the trial court's finding that there was not even negligence on the part of respondent, but if the evidence had been

sufficient to sustain a finding of negligence and the trial court had made such a finding, such negligence would not have exonerated appellant. Civ.Code, § 2629, now section 533, Insurance Code, St.1935, p. 510; *I. Upham Co. v. U. S. Fid. & Guar. Co.*, 59 Cal.App. 606, 211 P. 809.

[5] The further contention is made that "the judgment lacks evidentiary support for the reason that defendant was exonerated from liability by the act of plaintiff in settling and compromising his claim against Hoyos." This contention is based upon the following provision of the bond: "If the Assured shall sustain any loss that might be made the basis of a claim hereunder, and shall settle or compromise such loss with the Correspondent without first securing the consent of the Surety to such settlement or compromise, this bond shall thereupon become void from the beginning as to such Correspondent." Assuming, without deciding, that this defense was properly pleaded, we are of the opinion that there was no evidence which would have supported a finding sustaining such defense. The evidence merely showed that respondent had taken certain collateral security from Hoyos as a guarantee of his obligations. Respondent did not relinquish any rights against Hoyos at any time and it is entirely clear that he did not "settle or compromise" the loss. The mere taking of collateral security did not have the effect of exonerating appellant. *Equitable Trust Co. v. Aetna Indemnity Co.*, C.C., 168 F. 433; *McRae Grocery Co. v. Independence Indemnity Co.*, 4 Cir., 33 F.2d 494, 66 A.L.R. 338; *Oxley v. Storer*, 54 Ill. 159; *Pingrey on Suretyship*, § 123.

[6] The next contention of appellant is that "plaintiff's cause of action was barred by his failure to commence action within six months after proof of loss was filed." The bond provided: "Legal proceedings for recovery hereunder may not be brought until three months have elapsed after such proof of loss has been filed with the Surety, nor brought at all unless begun within six months after such proof of loss has been filed with the Surety." Respondent claimed and the trial court found that proof of loss was filed on January 7, 1933, and that the action was commenced on June 28, 1933. These findings are sustained by the evidence, and they support respondent's claim that the action was commenced within the time provided.

Appellant takes the position that certain preliminary correspondence constituted proof of loss; that any informality in the proof had been waived by their failure to object thereto; and that the action was barred because not brought within six months after the receipt of such correspondence. This position is untenable. In the correspondence prior to January 7, 1933, respondent stated that the exact amount of the loss would be submitted as soon as full particulars could be obtained and asked that appellant send him the "usual forms of proof of loss" in order that he might file the same as soon as he was able to secure full particulars of the loss and to determine the exact amount thereof. He also asked that appellant advise him "definitely the time limit within which proof of loss must be filed." This letter was obviously not intended to be the "affirmative proof of loss under oath, together with full particulars of such loss" as contemplated by the bond. The foregoing letter was not answered by appellant, but respondent prepared his formal proof of loss after receiving full particulars and filed it on January 7, 1933. Receipt thereof was acknowledged by appellant by letter dated January 13, 1933. We therefore conclude that appellant's claim that the action was barred is wholly devoid of merit.

[7-9] The final contention of appellant is that "the judgment erroneously allowed interest from January 7, 1933." We find no error in the allowance of such interest. The amount of damage which respondent had sustained was certain or was at least capable of being made certain by calculation at the time the proof of loss was filed on January 7, 1933. All that was necessary in order to compute the amount of such damage was to ascertain the value of the coffee which had not been delivered. Respondent was therefore entitled to such interest. Civ. Code, § 3287; *Olcovich v. Grand Trunk Ry. Co.*, 179 Cal. 332, 333, 176 P. 459; *Brandenstein v. Jackling*, 99 Cal.App. 438, 278 P. 880. The fact that respondent had taken security for Hoyos' performances of his obligations is immaterial as the security had been fully realized upon before the proof of loss was filed, and furthermore, even the existence of an unliquidated offset would not have affected respondent's right to interest. *Hansen v. Covell*, 218 Cal. 622, 24 P.2d 772, 89 A.

L.R. 670. Nor is there any merit in the claim that, under the terms of the bond, interest should not have been allowed in any event prior to April 7, 1933. The bond merely provided that: "Legal proceedings for recovery hereunder may not be brought until three months have elapsed after such proof of loss has been filed with the Surety." This provision did not defer the date upon which payment was to become due, but only deferred the date for the commencement of legal proceedings. The situation here is clearly distinguishable from that in *Kahn v. Allemannia Fire Ins. Co.*, 16 Cal.App.2d 39, 60 P.2d 149, 150, where the policy provided: "That the loss should be payable 'in thirty days after the amount has been obtained, either by agreement or by appraisalment,'" (Italics ours.)

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



24 Cal.App.2d 619

PEOPLE v. FREEMAN.

Cr. 3047.

District Court of Appeal, Second District,
Division 2, California.

Jan. 29, 1938.

1. Infants ⇨40(2)

Evidence held to sustain conviction of violating statute prohibiting the commission of a lewd act on a child under the age of 14. Pen.Code, § 288, as amended by St. 1933, p. 1028.

2. Criminal law ⇨1153(2)

Witnesses ⇨40(2)

Whether a child under 10 years is capable of receiving just impressions of facts respecting which the child is to be examined and relating them truthfully, rests within discretion of trial judge, whose discretion will not be disturbed on appeal in absence of abuse. Code Civ.Proc. § 1880, subd. 2.

3. Criminal law ⇨1134(2)

A reviewing court, in determining whether trial judge has abused his discretion in permitting a child under 10 years to

testify, will consider entire record made by child and will not confine review of question of child's competency to the voir dire examination. Code Civ.Proc. § 1880, subd. 2.

4. Witnesses ⇨40(2)

The permitting of a 6½ year old girl to testify in prosecution for committing a lewd act on the child was not an abuse of discretion, where it appeared from entire testimony of child that she was capable of receiving just impressions of facts relative to which she testified and relating them truly. Pen.Code, § 288, as amended by St. 1933, p. 1028; Code Civ.Proc. § 1880, subd. 2.

5. Criminal law ⇨1023(10)

An appeal does not lie from a sentence.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Edward Freeman was convicted of violating Penal Code, § 288, as amended by St.1933, p. 1028, relating to the commission of a lewd or lascivious act upon a child under the age of fourteen years, and from the judgment and an order denying his motion for a new trial, he appeals, attempting to appeal also from the sentence.

Attempted appeal from the sentence dismissed, and judgment and order affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

McCOMB, Justice.

Defendant was convicted after trial by jury of violation of section 288 of the Penal Code, as amended by St.1933, p. 1028. This appeal is from the judgment and order denying his motion for a new trial. There is also a purported appeal from the sentence.

Viewing the evidence most favorable to respondent, the essential facts are:

June 17, 1937, defendant took a female child of the age of six and one-half years into a garage and there committed an act prohibited by section 288 of the Penal Code, as amended by St.1933, p. 1028.

Defendant relies for reversal of the judgment on the following propositions:

First: The evidence is insufficient to sustain the judgment.

Second: The complaining witness, a child of six and one-half years of age was incapable of receiving just impressions of the facts relative to which she testified, and, therefore, it was prejudicial error for the trial court to receive her testimony in evidence.

[1] Defendant's first proposition is untenable. We have examined the record and are of the opinion there was substantial evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to sustain the facts hereinabove mentioned and each and every other material fact upon which the judgment of guilty was predicated. *Thatch v. Livingston*, 13 Cal.App.2d 202, 56 P.2d 549; *People v. Groves*, 9 Cal.App.2d 317, 321, 49 P.2d 888, 50 P.2d 813; *Leavens v. Pinkham & McKevitt*, 164 Cal. 242, 245, 128 P. 399.

[2] Defendant's second proposition is likewise untenable. The law is settled in California that whether or not a child under the age of ten years is capable of (a) receiving just impressions of the facts respecting which the child is to be examined, and (b) relating them truthfully, section 1880, subd. 2, Code Civ.Proc. is a question the determination of which rests in the sound discretion of the trial judge; and in the absence of a showing of an abuse of this discretion by the trial judge his decision will not be disturbed on appeal. *People v. Valenti*, 103 Cal.App. 249, 251, 284 P. 485.

[3] It is likewise settled that this court, in determining whether the trial judge has abused his discretion in permitting a child under ten years of age to testify, will review the entire record made by the witness and not confine the review of the question of the child's competency to the voir dire examination. *People v. Walker*, 112 Cal. App. 146, 147, 296 P. 692.

[4] Applying the foregoing rules to the instant case, it appears from the entire testimony of the complaining witness that she was capable of receiving just impressions of the facts relative to which she testified and relating them truly. No useful purpose would be subserved by setting forth in this opinion, the sordid details of the complaining witness' testimony, which we therefore omit.

[5] An appeal does not lie from the sentence. *People v. Arrangoiz*, Cal.App., 74 75 P.2d—41

P.2d 789. Therefore, the purported appeal from the sentence is dismissed.

The judgment and order are and each is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



24 Cal.App.2d 567

**OGANDO v. CARQUINEZ GRAMMAR
SCHOOL DIST. OF CONTRA COSTA
COUNTY et al.
Civ. 10076.**

District Court of Appeal, First District,
Division 1, California.

Jan. 27, 1938.

Hearing Denied by Supreme Court
March 28, 1938.

1. Schools and school districts ☞112

An action against school district for death of child as result of teachers' negligence in failing to supervise children's play, as required by rule of state board of education, was not barred by plaintiff's failure to file verified claim for damages with district clerk within 90 days after accident as required by statute before commencing action based on negligence resulting in defective or dangerous condition of public streets, buildings, etc. *St.1931, p. 2476.*

2. New trial ☞6

The granting or refusal of new trial rests very largely within trial court's discretion, which is extremely wide.

3. Appeal and error ☞979(1)

The trial court's ruling, granting or refusing new trial, will not be disturbed by appellate court, especially where new trial was granted for insufficiency of evidence to sustain jury's verdict, in absence of clear, affirmative showing of gross manifest or unmistakable abuse of discretion.

4. Appeal and error ☞977(3)

A reviewing court will set aside order granting new trial only in rare instances and on very strong grounds.

5. New trial ☞72

On motion for new trial because of insufficiency of evidence to sustain jury's verdict, trial court must scrutinize and weigh evidence, and new trial should be granted, if court believes that facts on which jury's

decision is based are insufficient to justify it, or that weight of evidence is against it, though court may draw inferences opposed to those of jury.

6. Appeal and error ☞979(2)

An order granting new trial for insufficiency of evidence to sustain jury's verdict will not be set aside on appeal, if reasonable or fairly debatable justification therefor appears or reasonable minds might differ in their deductions from evidence, though appellate court might take different view than trial court or believe evidence sufficient to support judgment if new trial were denied.

7. Appeal and error ☞1015(1)

Schools and school districts ☞121

Evidence in action against school district for death of child held sufficient to warrant trial court's conclusion that teachers' failure to supervise children's play, as required by rule of state board of education, constituted negligence proximately causing child's death, so as to preclude appellate court from disturbing trial court's ruling granting plaintiff new trial for insufficiency of evidence to sustain verdict for defendants.

Appeal from Superior Court, Contra Costa County; A. Caminetti, Jr., Judge.

Action by Joe Ogando against the Carquinez Grammar School District of Contra Costa County and its Board of Trustees to recover damages for the death of plaintiff's daughter as the result of injuries received while attending school. Judgment on a verdict for defendants, and, from an order granting plaintiff's motion for a new trial, defendants appeal.

Order affirmed.

James F. Hoey, of Concord, John J. Taheny, of San Francisco (Hoey, Hamilton & Turner, of Concord, of counsel), for appellants.

David D. Oliphant, Jr., of Oakland, for respondent.

KNIGHT, Justice.

The superior court granted plaintiff's motion for a new trial upon the ground of insufficiency of the evidence, and the defendants appeal. The action is for damages, and was brought against the Carquinez Grammar School District and its board of trustees by the father of Aileen Ogando, a ten year old child, who died

as the result of injuries received while attending school.

[1] Defendants' first contention is that under the provisions of chapter 1168 of the Statutes of 1931, p. 2476, it was necessary for plaintiff as a prerequisite to the commencement of the action to file a verified claim for damages with the clerk of the school district within ninety days after the accident, which admittedly he did not do, and that therefore the trial court should have granted defendants' motion for nonsuit. It has been held, however, that the requirements of said statute (as it stood prior to its amendment in 1937, Stats.1937, p. 585) were restricted to the class of cases embraced within its title; namely, to cases founded on the alleged negligence of officers and employees of public and quasi public corporations in connection with the defective or dangerous condition of public streets, highways, bridges, buildings, works, or property of such public or quasi public corporations; and that cases based on general acts of negligence of such officers and employees did not fall within the scope of said statute. *Jackson v. City of Santa Monica*, 13 Cal.App.2d 376, 57 P.2d 226; *Kenney v. Antioch Live Oak School District*, 18 Cal.App.2d 226, 63 P.2d 1143. And here the allegations of the complaint as well as the evidence adduced at the trial show that the present action is of the latter class. The trial court properly held, therefore, that the action was not barred by the provisions of said statute.

[2-6] Defendants' second and final contention is that in any event the evidence would be insufficient as a matter of law to sustain a verdict in plaintiff's favor, and that therefore the trial court erred in granting a new trial. There is no merit in the contention. The granting of or refusal to grant a new trial rests very largely within the discretion of the trial court—a discretion which is extremely wide; and its ruling will not be disturbed, especially where, as here, a new trial has been granted on the insufficiency of the evidence, unless there is a clear and affirmative showing of a gross, manifest, or unmistakable abuse of the discretion it is called upon to exercise. 20 Cal.Jur. pp. 27-31. In other words, it is only in rare instances and on very strong grounds that the reviewing court will set aside an order granting a new trial. *Morgan v. Los Angeles Pacific Co.*, 13 Cal.App. 12, 108 P. 735. Further-

more, as frequently pointed out in the decisions, in considering such a motion it is not only the trial court's province but its duty to scrutinize and to weigh the evidence, and if in its opinion the facts upon which the decision of the jury is based are insufficient to justify that decision, or if it believes that the weight of the evidence is against the decision, a new trial should be granted, even though the inferences it may draw are opposed to those drawn by the jury. 20 Cal.Jur. pp. 26, 27. If, therefore, on appeal the case shows a reasonable or fairly debatable justification for the trial court's order, or the evidence presents a situation where reasonable minds might differ in their deductions, said order will not be set aside, even though the court of appellate jurisdiction might take a view different from that of the trial court (*Kramm v. Stockton Electric R. Co.*, 10 Cal.App. 271, 101 P. 914; *Springer v. Pacific Fruit Exchange*, 92 Cal.App. 732, 268 P. 951), or believe the evidence would be sufficient to support a judgment in the event a new trial had been denied (*Glascock v. Waters*, 136 Cal.App. 713, 29 P.2d 434).

[7] Here the evidence is legally sufficient in our opinion to support the inference that the fatal injuries suffered by the child were proximately caused by the defendants' negligence in failing to comply with certain rules for the care and safety of the children while upon the school premises. The main facts established thereby are these: The school recessed regularly at noon, and the lunch period ended at 12:20 o'clock, at which time the children were released to play in the school yards until the beginning of the afternoon school session at 1 o'clock. Between the two wings of the school building there is a court or playground, which was reserved during the noon recess for the younger girls. After eating lunch the group of girls of which the injured girl was one usually engaged in the game of hide-and-seek on the west side of said court, using as the base for their game a wooden door leading to the janitor's room in the west wing of the building. On the day of the accident, upon being released at 12:20 they went immediately into the court to start their game, but found another group of girls playing in their location and using the janitor's door for a base, so the group with which the Ogando child was playing went over to the east wing of the building and selected for a

base the middle wooden frame of the French doors leading to the auditorium. Each of the two French doors contained eight panes of ordinary single-strength sixteen-ounce window glass. The children started their game and had been playing approximately fifteen minutes, when the Ogando child, in running swiftly to the doors to reach and touch the base ahead of another girl, ran her outstretched left arm through the glass and jerked it back immediately. The result was that the broken pane of glass cut a deep gash across her elbow, severing the brachial artery and causing profuse hemorrhage. Confused and terrified, and with blood spurting from the wound, she ran screaming in a circle around the yard. Several of her companions ran to tell the teachers about the accident, and finally one older girl took hold of the injured child and led her to the room of the school nurse and left her there until another girl went to find the nurse. As soon as the nurse arrived she stopped the flow of blood by holding the artery, and summoned a doctor. When the doctor arrived he put a tourniquet on the arm and later a second one, and the child was then conveyed to a hospital in Richmond; but having lost such a great quantity of blood before she was given first aid by the school nurse, she died that same night at 8 o'clock.

Among the rules and regulations promulgated by the state board of education governing the duties of school principals and teachers, and which are doubtless founded on the rule of liability under the common law, are the following: "Where special playground supervision is not provided (and admittedly there was none here), teachers shall supervise the conduct and direct the play of the pupils of their classes in the school or on the school grounds during intermissions and before and after school. Teachers must exercise a general inspection over the conduct of pupils going to and returning from school. All athletic or social activities, wherever held, when conducted under the name or auspices of any public school, or of any class or organization thereof, shall be under the direct supervision of the school authorities." "1. The attention of governing boards of school districts is called to the liability imposed upon them by law in cases of injury or damage to person or property responsibility for which rests with the district or the officers, agents or employees thereof." The teaching staff of the school in question consisted of a princi-

pal and twenty-five teachers, but it appears from the evidence, without dispute, that on the day of the accident no supervision whatever was exercised over the children in said court, either at the time they selected the dangerous base and started to play their game, or at any time while the game was in progress; nor was any teacher in the vicinity of the court when the child was injured. Two of the teachers had been assigned to supervise the activities of the children playing in this particular court, but under the school rules they did not go on duty as such supervisors until 12:30, following which they remained in the court less than a minute and a half; their duties having called them elsewhere. In this connection one of the teachers testified that as soon as she went on duty as such supervisor she walked from the building into the yard for a distance of twelve or thirteen feet, remained there for a minute or a minute and a half, and was then compelled to re-enter the building to stop some noise which was being made in the hall by other pupils; and that during the brief period of time she was in the court she did not observe that any game was in progress. The other teacher testified that upon taking up her duties as supervisor she walked down the court along the east wing, and that she too was compelled to re-enter the building at once and go to the location of the merry-go-round, to quiet a disturbance that was going on there; and that when she walked down the court she did not observe any game being played thereon. It was shortly after they re-entered the building that the accident happened. One of said teachers frankly stated that had she remained longer in the court she would have noticed the manner in which the children were playing their game, and would have stopped it. Moreover, as plaintiff contends, the trial court was evidently justified in drawing the inference that the presence of a teacher in or near the court while the game was being played would likely have resulted in saving the child's life because she would have taken charge of the injured child at once and either arrested the flow of blood herself or instantly summoned the school nurse.

Therefore, in view of the foregoing facts and circumstances, it is our opinion that the trial court was not unwarranted in concluding that the failure to supervise the conduct and play of the children on the occasion mentioned, as required by said rule of the state board of education, amounted to negligence, and that such negligence was

the proximate cause of the child's injury and death; and in that state of the record it is beyond the authority of the appellate court to disturb the ruling granting a new trial.

The order is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.



24 Cal.App.2d 506

GREENBERG v. CONTINENTAL CASUALTY CO.

Civ. 11360.

District Court of Appeal, Second District,
Division 1, California.

Jan. 24, 1938.

Hearing Denied by Supreme Court
March 25, 1938.

1. Contracts ⇨155

An ambiguous contract must be interpreted most strongly against parties who caused uncertainty. Civ.Code, § 1654.

2. Insurance ⇨146(3)

Where language of insurance contract is reasonably open to two constructions, that more favorable to insured will be adopted.

3. Insurance ⇨146(1)

Words of insurance contract will be given meaning which common speech imports, unless obviously intended to be used in technical connotation.

4. Insurance ⇨146(3)

A court will not refuse to attribute broad meaning to disputed phraseology of insurance contract in order to avoid forfeiture of insured's accrued rights thereunder as result of his payment of large sum over period of years as premiums.

5. Contracts ⇨143

In absence of ambiguity and uncertainty in valid contract, court's power is limited to enforcing it according to its terms.

6. Contracts ⇨1

Parties may make whatever contracts they please, so long as there is no fraud, deception, or infringement of law.

7. Contracts ⇨1

The fact that bargain is hard one does not invalidate contract.

8. Insurance ⇨365(2)

The word "insurability" in provision of accident and health policy for reinstatement thereof after default in payment of premium, if insured submits evidence of insurability satisfactory to insurer, is not ambiguous, so as to require interpretation thereof most favorably to insured as relating only to continuance of good health and not amount of combined monthly indemnities under all insurance policies issued to him; an "insurable" person being one capable of being insured, proper to be insured, or affording sufficient ground for insurance.

The word "insure" has been defined as "to assure against a loss by a contingent event, on certain stipulated conditions, or at a given rate or premium; to give, take or procure an insurance on or for; to enter into or carry a contract of insurance on"; while "insurable" is defined as "capable of being insured against loss, damage, death, etc.; proper to be insured; affording a sufficient ground for insurance," and "insurability" as "quality or condition of being insurable."

[Ed. Note.—For other definitions of "Insurability" and "Insure," see Words & Phrases.]

9. Contracts ⇨175(1)

Contracting parties must be assumed to know at least common words of English language.

10. Insurance ⇨365(2)

The phrase "satisfactory to the company" in provision of accident and health insurance policy for reinstatement thereof after default in payment of premium on insured's application, accompanied by evidence of insurability satisfactory to the company, is not ambiguous and uncertain, so as to require interpretation of policy most strongly against insurance company; such provision merely imposing on company right and responsibility of determining whether evidence of insurability is satisfactory.

11. Insurance ⇨365(2)

A provision in accident and health insurance policy for reinstatement thereof after default in payment of premium on insured's written application, accompanied by evidence of insurability satisfactory to insurance company, gives such company's officers discretion, not subject to review by courts, to determine what is satisfactory evidence of insurability.

12. Insurance ⇨365(1)

Insured cannot be heard to complain because insurer's tentative offer to issue new policy after termination of accident and health insurance policy by denial of insured's application for reinstatement thereof following default in payment of premium was not the same as offer on which original policy was based; insured having privilege of accepting or rejecting offer.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Joseph B. Greenberg against the Continental Casualty Company for damages arising from defendant's refusal to reinstate a noncancelable accident and health insurance policy. Judgment for defendant, and plaintiff appeals.

Affirmed.

Hearing denied by Supreme Court; SEAWELL and CURTIS, JJ., dissenting.

Martin Gang and Robert E. Kopp, both of Los Angeles, for appellant.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for respondent.

DORAN, Justice.

Plaintiff appeals from a judgment in favor of defendant in an action for damages arising from the refusal of said defendant (sometimes referred to as "the company" or "respondent"), to reinstate a noncancelable policy of insurance. The policy in question was issued to plaintiff on April 11, 1924, and provided for payment of \$250 per month in the event of accidental injury or sickness, and the sum of \$25,000 in the event of accidental death. Plaintiff's original application for this insurance, filed with the company, certified, among other things, that his occupation was that of "Merchant and Auctioneer"; and that he was then in possession of a health and accident policy in another company providing for monthly payments up to \$250, as well as three life insurance policies in other companies aggregating the sum of \$12,000.

The policy contained the following provision relative to reinstatement: "22. After any default in payment of premium, this policy may be reinstated * * * on written application by the Insured to the General Office of the Company and the payment of the defaulted premium, provided the Insured shall submit with such application *evidence of insurability satisfactory to the Company.*" (Italics added.)

After the issuance of the policy in question, plaintiff paid all of his premiums within the proper time until the premium dated April 11, 1935, became due and payable. The check for this payment was not mailed by plaintiff until May 16, 1935, some three days after the expiration of the grace period. This check was returned; the company declaring that the policy had lapsed because of the delinquent payment. Several letters were exchanged between plaintiff and defendant, in one of which, by plaintiff, was enclosed an application for reinstatement together with tender of payment of the defaulted premium, and, also included, was an affidavit of proof by plaintiff's physician as to the insured's good health. The application for reinstatement indicated that at this time plaintiff's occupation was that of "Vice President of the 3-G Distillery Corp.," and that he was in possession of health and accident policies in other companies providing for a total of \$350 in monthly indemnities, and also policies aggregating the sum of \$33,000, in the event of accidental death. Plaintiff testified that he was earning a salary at this time of \$1,000 per month, and was receiving some \$3,000 per year in addition to his salary, as dividends upon stock owned by him in the company of which he was an officer.

The application for reinstatement was rejected by the company, and in a letter to plaintiff dated August 17, 1935, said company stated its grounds as follows:

"We have been considering Mr. Greenberg's reinstatement application, and notice he schedules approximately \$350.00 of monthly indemnity in addition to our policy, which was for \$250.00 monthly. We also notice that he has \$33,000.00 accidental death indemnity on his life insurance policies.

"Our company is willing to reinstate, or consider issue of disability insurance up to fifty per-cent of an applicant's net earned income, but in no event beyond \$500.00 combined monthly indemnity, which figure must include all companies and all lines of insurance. We also do not participate in over \$25,000.00 accidental death indemnity, more than which is already carried by Mr. Greenberg, therefore, under our particular policy, we would not be willing to reinstate any principal sum indemnity, but we would be willing to reinstate enough of the monthly indemnity so that the total amount carried would not exceed \$500.00 per month. This would require a reduction of \$100.00

under our policy. If Mr. Greenberg is interested in that amount of indemnity, kindly write us further, and we will send him the necessary applications to do this, and will then state what other insurability requirements are needed."

The legal effect of the foregoing letter, regardless of the use therein of the word "reinstate," was, in fact and in law, a denial of plaintiff's application for the reinstatement of the policy, and at the same time a tentative offer to reinsure on different terms.

An action was filed by plaintiff for breach of contract to reinstate the original policy; upon trial thereof judgment was rendered in favor of defendant. It is from this judgment, as heretofore stated, plaintiff appeals.

[1-3] Appellant contends in substance, first, that the phrase "evidence of insurability," as used in provision number 22 in the policy, hereinbefore quoted, relates only to matters concerning good health and its continuance, and does not include all of the factors which influence the determination of the question as to whether in the first instance a policy will be issued by the company; second, that the clause "evidence of insurability satisfactory to the company" is ambiguous and uncertain. In connection with this last-mentioned contention, it is urged "that in the event of ambiguity a contract is to be interpreted most strongly against the parties who caused the uncertainty to exist Civ.Code, § 1654." That this is the law there can be no question, and, as pointed out by appellant in the following quotation, "The phraseology of contracts of insurance is that chosen by the insurer and the contract in fixed form is tendered to the prospective policyholder who is often without technical training, and who rarely accepts it with a lawyer at his elbow. So if its language is *reasonably open to two constructions*, that more favorable to the insured will be adopted [citing cases], and unless it is obvious that the words are intended to be used in their technical connotation they will be given the meaning that common speech imports." (Italics ours.) *Aschenbrenner v. United States Fid. & G. Co.*, 292 U.S. 80, 54 S.Ct. 590, 592, 78 L. Ed. 1137.

There is authority, too, for appellant's contention first above mentioned; namely, that "insurability" means "good health." *Sussex v. Aetna Life Assurance Company*, 33 Dominion Law Reports 549, 38 Ontario 365; *Missouri State Life Ins. Co. v.*

Hearne, Tex.Civ.App., 1920, 226 S.W. 789; Illinois Bankers Life Ass'n of Monmouth, Ill., v. Palmer, 176 Okl. 514, 56 P.2d 370, 372; Illinois Bankers Life Assurance Co. v. Payne, Tex.Civ.App., 1936, 93 S.W.2d 576.

As a third contention it is urged by appellant that "upon proof of good health by the insured the burden of proving a valid reason for dissatisfaction rests upon the Insurance Company"; and that the phrase "satisfactory to the company" does not give the company the right to arbitrarily reject the application for reinstatement.

Assuming that appellant's third contention is warranted by the record, it is, to some extent, supported by the following authority, among others: "Where the holder of a policy of life insurance has, by its terms, a vested contract right to reinstatement, conditioned only upon payment of arrears of premiums and advances made on the policy, with interest, and 'upon evidence of insurability satisfactory to the company' (Rome Industrial Ins. Co. v. Eidson, 142 Ga. 253, 255, 82 S.E. 641), such vested right cannot be impaired or limited by subsequent conditions contained in the application for reinstatement furnished by the insurer." [Winder National Bank v. Aetna Life Ins. Co., 36 Ga.App. 703, 137 S.E. 848.] In the case of Mutual Life Ins. Co. of N. Y. v. Lovejoy, 203 Ala. 452, 83 So. 591, it is said: "The clause of the contract to 'reinstate' does not mean to reinsure under another and different contract; it implies the right of the insured to be placed in the same condition that he occupied before the forfeiture, and it implies the duty on the part of the insurer to place the insured in that condition, and it allows no right to exact other conditions, precedent or subsequent, to reinstatement. [Citing cases.]' The rights of the parties in this case were fixed by the contract of insurance." Illinois Bankers Life Ass'n of Monmouth, Ill., v. Palmer, supra.

[4] It is urged, by way of argument in support of the foregoing contentions by appellant, that because a large sum has been paid over a period of years, as a premium on account of the contract in question, to attribute a broad meaning to the disputed phraseology would result in an unwarranted forfeiture of the accrued rights of the insured. It is altogether likely that the same subject was a topic of discussion in connection with the authorities relied upon by appellant, but from the standpoint of logic the argument is wholly beside the issue and

without merit, unless sentiment or some other emotional influence is to be substituted for reason as the basis for whatever conclusion might be reached.

Before proceeding with a summary and disposition of the decisive questions involved it should be noted that there is respectable authority supporting an entirely different conclusion than that reached by the authorities upon which appellant relies. The Supreme Court of the state of Washington had occasion to pass upon the same question. There the court held: "The question now submitted is: Did Conway (plaintiff and appellant) have such a legal right to reinstatement as can be enforced against the denial of such right by the company. It will readily be admitted * * that, after a forfeiture of a life insurance policy because of nonpayment of assessments, the right to reinstatement depends on the provisions of the contract. Since the right is not absolute, the insurer may impose such conditions as it sees fit, not contrary to public policy, on which reinstatement may be had. * * * The rule is also laid down that compliance with the conditions gives the delinquent an absolute right to reinstatement, *if the provisions of the contract do not make the reinstatement optional with the officers of the company.* The provision of the contract in this instance * * * is as follows: 'Any person, having once been a member of this company, may be readmitted in the discretion of the officers of this association, upon his furnishing them satisfactory evidence that he is in good health, and upon his paying to said association all assessments due' * * * Respondent contends, which was also the theory upon which the court below made its order of dismissal, that this provision destroys the absolute right to reinstatement, and makes such reinstatement optional with the officers of the company in providing that readmission shall be in their discretion, and that the evidence of good health shall be such as is satisfactory to them, and, that having so acted, such discretion is now reviewable in the courts; while appellants contend that the word 'discretion' is to be construed in the sense of judicial discretion, and may be reviewed when it appears to have been arbitrarily exercised, as they claim here. While it may be difficult to give a satisfactory definition of the term 'judicial discretion' because of the wide difference of the authorities as to its nature, it may be said to be a discretion that is sound and guided by the fixed prin-

ciples of law. (6 Encl.Pl. & Pr. 819.) But, even in cases calling for the exercise of such discretion, it will not be reviewed except for its manifest abuse. Such is, we believe, the universal rule. Where, however, discretion is vested in a nonjudicial body, such as trustees or officers of a corporation, or other public functionaries, its exercise does not call for the application of any fixed rules or principles of law, and its meaning cannot be so limited nor restricted, since to do so would be to take such a discretion away from the body upon which it is conferred and bestow it upon some other body and so on ad infinitum, so long as the right of appeal or review existed. * * *

We do not know the facts operating upon the minds of the officers of this company, inducing them to exercise their discretion against the reinstatement of this applicant, nor why his evidence of good health was not satisfactory to them, except as we read the record and find therein facts which might have influenced them in arriving at the conclusion they did. * * *

In his application for reinstatement he was rated as a first-class risk, 'except for age and amount of stimulants taken.' Statements as to age and habit as to use of liquors are statements material to the risk, and, while we do not hold as a matter of law that the discrepancies here noted would in themselves be sufficient to avoid the policy or to prevent reinstatement, if such question was purely one of law and properly submitted to us as such, we cannot say that they would not influence the sound judgment and good conscience of an officer of an insurance company in whom discretion is vested to pass upon such matters. Neither can we eliminate from this contract the fact that this medical examination upon application for reinstatement must disclose a condition of good health satisfactory, not to the applicant nor to the physician conducting the medical examination, *but to the officers of this company in whom by his contract the applicant had placed the judgment and discretion to decide, a decision they must arrive at according to the dictates of their own judgment and consciences, and which cannot be controlled or directed by the judgment or conscience of others.* To hold otherwise would be to destroy that element of individuality and personal judgment which must enter into any decision, and to substitute for the discretion and satisfaction of one body the discretion and satisfaction of other bodies, strangers to the contract and not within its contemplation,

and making the contract read in effect that reinstatements may be had upon the applicant furnishing evidence of reasonably good health, instead of, as it does read, 'in the discretion of the officers of this association, upon his furnishing them satisfactory evidence that he is in good health.'" (Italics added.) *Conway v. Minnesota Mut. Life Ins. Co.*, 62 Wash. 49, 112 P. 1106, 1108, 40 L.R.A.,N.S., 148.

Returning now to the subject of the decisive questions involved, they may be summed up as follows: First (as contended by appellant), that the phrase "evidence of insurability" is ambiguous and that such phrase should be held to mean "evidence of good health"; second (as further contended by appellant), that the phrase "satisfactory to the company" is also uncertain and ambiguous, and should not be given a meaning that would permit the company to reject the application for reinstatement when, as conceded by respondent, good health was not denied.

[5-7] No question of public policy or valid statutory regulation is involved. The law applicable to the disputed questions is solely the law of contracts, and in that connection it is elementary that parties to a contract are entitled to have the agreement enforced according to its terms. When, of course, a contract is uncertain and ambiguous it becomes the duty of the court to determine, if possible, what is intended, but in the absence of such ambiguity and uncertainty, and when the contract is in all respects valid, the power of the court is limited to enforcing such contract according to its terms. In that connection it might be appropriately observed that: "It is competent for the parties to make whatever contracts they may please, so long as there is no fraud or deception or infringement of law. Hence the fact that the bargain is a hard one will not deprive it of validity." *Herbert v. Lankershim*, Cal.Sup., 71 P.2d 220, 253.

[8,9] With regard to the first decisive question above mentioned, there is no merit to the claim that the word "insurability" is ambiguous, unless it be charged that the English language is hopelessly inadequate and insufficient to express human thoughts. Indeed, the word is so simple—constructed as it is just as hundreds of other words are constructed—that its derivation scarcely warrants attention. However, to remove any doubt that it is a simple English word, it might be worth while to note, by analysis,

that it is composed of the verb "insure," the suffix "able," which converts the verb into an adjective, and the suffix "ity," which then converts the adjective into an abstract noun. The word *insure*, in Webster's New International Dictionary, Second Edition, is defined as, "to assure against a loss by a contingent event, on certain stipulated conditions, or at a given rate or premium; to give, take, or procure an insurance on or for; to enter into, or carry, a contract of insurance on." The definition of the adjective *insurable* is given as, "capable of being insured against loss, damage, death, etc.; proper to be insured; affording a sufficient ground for insurance." The addition of the suffix *ity*, converting the word insurable from an adjective to an abstract noun, is defined as, "quality or condition of being insurable." Thus it may be seen that a man who is insurable is one who is capable of being insured; proper to be insured; or who affords a sufficient ground for insurance. His *insurability* would be determined by a consideration, in the abstract, of the facts known about him. The word is in general use, and has but one meaning which is in no sense technical. Neither by definition nor by rule can its meaning be restricted to signify only "good health." The contracting parties must be assumed to know the English language, at least the common words, otherwise the courts would be continually called upon to define and interpret words, the definition and meaning of which can be found in every authoritative English dictionary. Because of the failure of the authorities relied upon by appellant to recognize this simple truth, namely, that the word "insurability" is not ambiguous, the reasoning followed in such cases is logically unsound. To assume, as those authorities do assume, that the word is ambiguous is to adopt a false premise, and from the standpoint of logic, to proceed with argument from a false premise can lead to but one conclusion; namely, a conclusion that is logically unsound. The Conway Case, *supra*, avoids this error, as a result of which the reasoning is logical and the conclusion is, therefore, sound.

[10] The second decisive question above mentioned, namely, that, as contended by appellant, the phrase "satisfactory to the company" is also ambiguous and uncertain, is subject to the same reasoning. How could the contracting parties have reduced their agreement to simpler language, and what words could have expressed more

clearly what is intended? Conceding, but only for the purpose of analysis, that the meaning of the word "insurability" is uncertain, nevertheless the contracting parties agreed, as the memorandum of their agreement clearly and unequivocally reveals, that the evidence of such "insurability" must be "satisfactory to the company." By agreement of the parties to the contract the right and responsibility of determining the question as to whether the "evidence of insurability" was satisfactory, was imposed upon and vested in one of the parties to the agreement.

[11] As heretofore noted, it is urged by appellant that the phrase "satisfactory to the company" does not give the company the right to arbitrarily reject the application for reinstatement. As to what is "arbitrary" is a matter of opinion. For the court to take the position that certain action by a party to the contract is arbitrary, would be the equivalent of determining what is "satisfactory evidence" of insurability. The contract in question clearly provides, as above stated, that what shall constitute "satisfactory evidence" is a question for the company to determine. It is purely a private matter addressed to the discretion of those officers of the company charged with the responsibility of determining such question, and is in no sense that judicial discretion which appellate courts have the authority to review. In the final analysis, whatever the word "insurability" means, the contract provides that the evidence thereof must be "satisfactory to the company." That question having been determined by virtue of and according to the clear and unequivocal terms of the agreement, there is nothing, under the circumstances presented herein, for judicial determination.

[12] Appellant's argument that the doctrine of estoppel applies, is without merit. In that connection it should be noted that the denial of the application for reinstatement terminated the contract. The tentative offer to insure, which was made by the company thereafter, was a new offer which the company had the right to make on its own terms. It was not an offer to reinstate the lapsed policy, with added and different conditions. The insured had the privilege of accepting or rejecting the offer and cannot be heard to complain because such offer was not the same as the offer upon which the original policy was based.

It is unnecessary to review the findings of fact and conclusions of law of the trial court. The denial by the company of appellant's application for reinstatement, under the circumstances presented by the record, gave rise to no cause of action. An objection to the introduction of testimony on the grounds that the complaint did not state a cause of action could have been properly sustained.

By whatever process the conclusion of the trial court was reached, the judgment that followed was in all respects correct, and it therefore should be, and is, affirmed.

We concur: YORK, P. J.; WHITE, J.



24 Cal.App.2d 541

ANGELIS et al. v. FOSTER et al.

Civ. 10426.

District Court of Appeal, First District,
Division 1, California.

Jan. 26, 1938.

Hearing Denied by Supreme Court
March 25, 1938.

1. Schools and school districts ☞89

Where a child returning home after school was struck, while crossing a highway through childish caprice, by a motorist who was allegedly driving negligently, at an excessive speed, while intoxicated, school district was not responsible for injuries child sustained, although it failed to provide child customary transportation home, since failure was a remote cause and proximate cause was motorist's intervening gross negligence which district could not anticipate. St.1935, p. 174, § 501.

2. Appeal and error ☞959(1)

Pleading ☞225(2)

Upon sustaining a demurrer the trial court has discretion to allow an amended complaint or to give judgment for defendant, and appellate court will not interfere unless record shows an abuse of discretion.

3. Pleading ☞225(2)

Court's refusal of leave to amend the complaint after sustaining a demurrer was not an abuse of discretion, where plaintiff did not specify nature of proposed amendment.

Appeal from Superior Court, Contra Costa County; A. F. Bray, Judge.

Suit by Evelyn Angelis, a minor, by William Angelis, her guardian ad litem, and another against J. G. Foster, also known as Joe G. Foster, the San Pablo School District of Contra Costa County, and others for injuries sustained when named plaintiff was struck by an automobile while she was on the way home from school. Judgment on an order sustaining, without leave to amend, a general demurrer by the school district and certain others, and plaintiffs appeal.

Affirmed.

Alfred C. Skaife and A. L. Crawford, both of San Francisco, for appellants.

Francis P. Healey, Dist. Atty., and J. Vance Forlier, Deputy Dist. Atty., both of Richmond, for respondents.

PER CURIAM.

The plaintiff, a minor, brought suit against defendant school district, its trustees and the principal of one of its schools, together with the owner and driver of an automobile, alleging negligence with consequent injury and damage. A general demurrer to the complaint filed by the district, its trustees and principal was sustained without leave to amend and plaintiff has appealed from the judgment entered thereon.

[1] The complaint alleged that plaintiff, a child seven years of age, was on the day she was injured a pupil in the San Pablo district school, and that prior thereto the trustees by resolution had deemed it advisable to provide transportation for the pupils of the school, but that on the day plaintiff was injured the trustees failed to provide such transportation; that as plaintiff was returning to her home after school and was passing along a path adjacent to and parallel with the public highway she suddenly proceeded to cross the highway and while so doing was injured by an automobile driven by defendant J. G. Foster. In this connection the complaint alleged in substance that Foster was driving negligently and at an excessive rate of speed while intoxicated and, notwithstanding that he saw the plaintiff, continued his course until she was struck and injured.

Plaintiff contends that the district and its trustees were negligent in failing to provide transportation on this occasion,

and that such negligence was a proximate cause of her injury.

Without discussing their duty to make such provision (although it may be said that the obligation does not appear to have been imposed by the statute—section 1.70, School Code, as amended by Stats.1933, p. 579), we think it clear from the facts averred that such failure was a remote and not a proximate cause of the plaintiff's injury. It is not alleged that it was necessary for plaintiff to cross the highway, but it rather appears from the facts that her conduct was due solely to a childish caprice. While the alleged failure to provide transportation may have been a condition in the order of causation by which the injury was brought about (*Oakland Bank of Savings v. Murfey*, 68 Cal. 455, 462, 9 P. 843), it was manifestly the gross and intervening negligence of Foster, which could not have been reasonably anticipated by respondents, which was the sole proximate cause of the damage. And this is particularly true where the intervening cause is a criminal act. Section 501, Cal. Vehicle Code, St.1935, p. 174. The following authorities support this conclusion: *Hale v. Pacific Tel. & Tel. Co.*, 42 Cal.App. 55, 183 P. 280; *McMillan v. Thompson*, 140 Cal.App. 437, 35 P. 2d 419; *De Vito v. Peterson*, 134 Cal.App. 100, 25 P.2d 19; 19 Cal.Jur.Negligence, § 17, p. 567.

The plaintiff also complains that the demurrer was sustained without leave to amend.

[2] Upon sustaining a demurrer the trial court has discretion either to allow an amended complaint or to give judgment forthwith for the defendant, and its action either way will not be interfered with upon appeal unless it is made to appear by the record that there has been an abuse of discretion. 21 Cal.Jur., Pleading, § 77, p. 119.

[3] The record shows no application for leave to amend, but it is admitted that plaintiff's attorney by letter to the trial judge requested such leave. However, no suggestion was made to the court as to the manner in which it was proposed to amend, nor was the nature of the proposed amendment specified. In such cases it has been uniformly held that a refusal of leave is not an abuse of discretion. *Bell v. Standard Quicksilver Co.*, 146 Cal. 699, 81 P. 17; *Kleinclauss v. Du-*

tard, 147 Cal. 245, 81 P. 516; *Stewart v. Douglass*, 148 Cal. 511, 83 P. 699; *Marsh v. Lott*, 156 Cal. 643, 105 P. 968; *Saint v. Saint*, 120 Cal.App. 15, 7 P.2d 374; *Zeh v. Alameda, etc., Hotel Corporation*, 122 Cal.App. 366, 10 P.2d 190.

No ground for reversal of the judgment has been shown, and the same is accordingly affirmed.



NEWCOMB v. CITY OF NEWPORT BEACH.*

Civ. 2154.

District Court of Appeal, Fourth District,
California.

Jan. 27, 1938.

Hearing Granted by Supreme Court
March 28, 1938.

1. Dismissal and nonsuit ⇨6, 19(3)

A plaintiff's motion to dismiss the complaint should not be granted where it is made after all the evidence is received and the case is practically submitted, and defendant has filed a cross-complaint seeking affirmative relief. Code Civ.Proc. § 581, as amended by St.1935, p. 1947.

2. Appeal and error ⇨1203(5)

In action against city to quiet title, wherein city, which claimed under tax deeds, filed cross-complaint to quiet title to the same property, and judgment for plaintiff was reversed with directions to quiet plaintiff's title on payment of amount expended by city for delinquent taxes and to protect public easement for navigation, commerce, and fishery purposes, plaintiff's motion to dismiss the complaint after all the evidence had been received and the case practically submitted was properly denied. Code Civ. Proc. § 581, as amended by St.1935, p. 1947.

3. Appeal and error ⇨1195(3)

In action to quiet title, decision on defendant's appeal that plaintiff's title should only be quieted if plaintiff paid amount expended by defendant for delinquent taxes was the "law of the case," and, on failure to make such payment, plaintiff could not attack judgment quieting defendant's title.

[Ed. Note.—For other definitions of "Law of the Case," see Words & Phrases.]

*For subsequent opinion see 83 P.2d 21.

4. Quieting title — 49

In action to quiet title, where trial court, in accordance with directions of Supreme Court, entered findings and conclusions requiring plaintiff to pay amount expended by defendant for delinquent taxes as a condition of quieting plaintiff's title, and plaintiff had notice of requirement but failed to make payment, plaintiff could not attack judgment quieting defendant's title, notwithstanding that trial court made no formal interlocutory decree requiring such payment.

Appeal from Supreme Court, Orange County; H. G. Ames, Judge.

Action to quiet title by Sarah A. Newcomb against City of Newport Beach, wherein defendant filed a cross-complaint seeking to quiet its title to the same property. From a judgment for defendant, plaintiff appeals.

Affirmed.

P. E. Keeler, James W. Bell, and Edward V. Jones, all of Los Angeles, for appellant.

Roland Thompson, of Santa Ana, for respondent.

BARNARD, Presiding Justice.

The plaintiff brought this action to quiet her title to certain lots within the bounds of the defendant city, which lots were found to be tidelands in Newport Bay. The defendant answered and filed a cross-complaint seeking to quiet its title to these lots. The plaintiff had obtained title under a patent issued by the state of California and the defendant claimed under certain tax deeds. On a former appeal, *Newcomb v. City of Newport Beach*, 7 Cal.2d 393, 60 P.2d 825, 832, the Supreme Court reversed a judgment in favor of the plaintiff. It was held that the tax deeds under which the defendant claimed were invalid but that the plaintiff, as a condition of having her title quieted, must repay the amount expended by the defendant for delinquent taxes. It was further held that these lands were subject to an easement in favor of the public for navigation, commerce and fishery purposes, and that the rights of the defendant city as administrator of these public trusts had not been sufficiently protected by the decree and judgment, and the trial court was directed "to make findings and enter judgment on this phase of the case in

accord with the views herein expressed, and also to determine the amount which plaintiff must pay to the city as a condition to quieting her title, subject to the public trust, against the city."

When the matter again came on for hearing in the trial court it was stipulated that the amount which the city had paid, and which had not been repaid to it, on account of the taxes in question was the sum of \$708.75, with interest thereon at 7 per cent. from July 7, 1931. After the judge stated he would sign findings in accordance with the direction of the Supreme Court, counsel for the plaintiff moved to dismiss the complaint in the action, which motion was denied. Findings were filed on February 10, 1937. Among other things, it was found that the plaintiff is the owner of the land in question, "subject to the easement of the public for the public uses of navigation, commerce and fishery" and to the right of the city as successor to the state of California as administrator and controller of these public trusts, with the right to enter and, in the preservation and advancement of said public uses, to alter, change, and improve said premises, and subject further to the right and power of the United States of America to fully control navigation, commerce, and fishery in and over said premises. It was further found that the defendant had paid the sum of \$708.75 on account of certain taxes and penalties, that the defendant had received two tax deeds, both of which were void, and that the plaintiff had not paid or tendered to the defendant the sum of \$708.75 so paid out by the city for taxes. Among other conclusions of law it was found that before the plaintiff is entitled to a decree quieting her title, subject to the public trusts which were mentioned and described, she "shall within five (5) days from and after the signing of these findings" pay to the defendant the sum of \$708.75 on account of taxes and penalties paid by the defendant, with interest thereon from July 7, 1931, to the date of payment at the rate of 7 per cent. per annum; that the plaintiff is entitled to a decree quieting her title as against the defendant, subject to said public trusts, when and if she shall pay, within the time specified, the said sum of \$708.75 with interest to the defendant; and that if the plaintiff should fail to pay said amount with interest to the defendant within five days from and after the date the findings were signed,

or pay the same into court for the benefit of the defendant, then the defendant should be entitled to a decree quieting its title in said premises, subject to the public trusts thereinbefore mentioned. Notice was served on the plaintiff on March 17, 1937, that these findings were signed on February 10, 1937, which notice set forth the portions of the conclusions of law which have been referred to. The notice further stated that unless the sum of \$708.75, with interest as specified, was paid to the defendant within ten days from the date thereof, or into court for the benefit of the defendant, as directed by the court, the defendant would apply to the court for a decree quieting its title in and to the premises, subject to the public trusts mentioned in the findings. The money was not paid within the time given or at all, and on May 15, 1937, a judgment was entered which, among other things, stated that the sum of \$708.75 had not been paid to the defendant nor paid into court for its benefit, and which judgment quieted the title to the property in the defendant subject to the above-mentioned public trusts. From this judgment the plaintiff has appealed.

[1,2] The main and almost the only point raised by the appellant is that the court erred in refusing to dismiss the action upon her request. Not only was the motion to dismiss made after all of the evidence had been received and the case practically submitted, but it fully appears that the defendant had filed a cross-complaint in which it sought affirmative relief. Under such circumstances a dismissal is not proper. Code Civ.Proc., § 581, as amended by St.1935, p. 1947; Calhoma Oil Corp. v. Conniff, 207 Cal. 648, 279 P. 771. This is particularly true in this case, since a former judgment in favor of this appellant had been reversed with specific directions to award certain relief to this respondent, and to which it was entitled in any event.

[3] A further consideration here is that the appellant, not having complied with the order requiring the payment of a certain sum, is, under what is now the law of this case, entitled to no relief and the questions raised are, in so far as she is concerned, practically moot. Having failed to establish title in herself through performance of the necessary condition, it is immaterial, so far as this appeal is concerned, whether or not the record sup-

ports the judgment which was entered in favor of the respondent. Penn v. Dyba, 115 Cal.App. 67, 1 P.2d 461.

[4] The statement is made by the appellant that there was no interlocutory decree imposing any condition upon her to be performed in any given time, although this matter is not argued. While no formal interlocutory decree was entered, the substance thereof was included in the findings and conclusions of law with definite provisions requiring that a certain amount be paid within a given time if judgment was to be entered in her favor. She was given formal notice of this, and judgment was not entered for nearly two months thereafter, and the required payment was never made or tendered. The appellant further states that the decree fixes certain rights in the United States which were not in issue and that the United States was not a party to this action. The rights of the United States government were discussed in the opinion on the former appeal and the findings followed the views therein expressed.

The judgment is affirmed.

I concur: MARKS, J.



24 Cal.App.2d 639

PEOPLE v. DWYER.

Cr. 1591.

District Court of Appeal, Third District,
California.

Jan. 31, 1938.

Hearing Denied by Supreme Court
March 2, 1938.

1. Indictment and Information ☞110(18)

An information alleging in words of statute that accused on specific dates entered designated buildings "with intent to commit theft therein," without alleging that accused "burglariously" or "feloniously" entered the building with intent to commit larceny or theft, sufficiently charged crime of burglary. Pen.Code, § 459.

2. Burglary ☞41(1)

Evidence held sufficient to sustain convictions of burglary of the second degree. Pen.Code, § 459.

3. Criminal law ☞404(4)

In prosecution for burglary, admission of shoes of accused with plaster of paris

cast of footprints found in slaked lime beneath window through which building was entered, leaving it to the jury to determine whether prints had been made by accused's shoes, was not error. Pen.Code, § 459.

4. Criminal law ⇨668

In prosecution for burglary where accused appeared as his own counsel and in testifying was permitted to make lengthy statements with little or no pertinency to the issues of the case and examination was given undue latitude and record did not show that testimony showing accused's innocence was excluded, accused could not contend that his evidence was unduly restricted. Pen.Code, § 459.

5. Criminal law ⇨798½

In prosecution for burglary, where it was stipulated that record contained no evidence of burglary of first degree, and there was no evidence which would support such verdict, it was not error to fail to submit to jury forms of verdict predicated on the order of burglary of the first degree. Pen. Code, § 459.

6. Criminal law ⇨1159(2)

A defendant may not complain of verdict which is supported by the evidence and which is more favorable to him than he deserves.

7. Burglary ⇨47

Finding of jury that accused was "guilty of burglary of the second degree" as to each count of information was sufficient. Pen. Code, § 1157.

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Clifford J. Dwyer was convicted upon two counts of an information charging him with separate burglaries, and he appeals.

Affirmed.

Clifford J. Dwyer, in pro. per.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment of conviction of two counts of an information charging him with separate burglaries. He was also charged with three

prior convictions of felonies, to each of which he pleaded guilty. The jury found him guilty of burglary of the second degree under both counts of the information. Judgment of conviction was accordingly rendered. The defendant, through his counsel, gave notice of appeal in open court, but failed to file with the clerk his application for transcription of the testimony and proceedings of trial, designating the grounds of appeal and the points relied upon, as required by rule 2, section 7, of the Rules for the Supreme Court and District Courts of Appeal.

In spite of the omission to conform to the requirements of rule 2, section 7, supra, since the appellant appears without counsel, in proper person, we have examined the record on its merits.

The appellant contends that the information fails to state facts constituting the offenses of burglary because it is not alleged the defendant entered the buildings with the "felonious or burglarious" intent of committing a theft of property. It is also asserted the evidence fails to support the verdicts or judgment; that the court erred in receiving expert testimony regarding the footprints of the defendant in a deposit of slaked lime; that the court erred in restricting the testimony offered by the defendant; and that the court erred in failing to submit to the jury forms of verdicts based on the theory of burglary of the first degree since under section 1157 of the Penal Code the jury is required to fix the degree of the crime involved.

[1] The separate counts of the information sufficiently charge the defendant in the language of section 459 of the Penal Code with the crimes of burglary by alleging that at specific dates he entered the designated buildings "with the intent to commit theft therein." It was not necessary to allege in the information that the defendant either "burglariously" or feloniously entered the building with the intent to commit larceny or theft. *People v. Rogers*, 81 Cal. 209, 22 P. 592; 9 C.J. p. 1053, §§ 94, 95; *People v. Myers*, 206 Cal. 480, 275 P. 219. Section 490a of the Penal Code authorizes the substitution in the information of the word "theft" for that of "larceny" which appears in the definition of burglary in section 459 of that Code. *People v. Myers*, supra.

[2] There is an abundance of evidence to support the verdicts and judgment of

convictions of burglary of the second degree which were rendered.

[3] The court did not err in receiving evidence of the witness Welch, a deputy sheriff, who testified that he found footprints in soft slaked lime beneath the window through which the defendant entered the building. Lime tracks were found on the floor inside the building, and also upon the soles of a pair of shoes which the defendant admitted belonged to him. These shoes were received in evidence and appeared to have been half-soled. The witness testified that he obtained plaster-paris casts of the footprints which he found in the lime beneath the window. These casts were received in evidence without objection. Upon objection the witness was not permitted to testify that the line across the plaster-paris cast indicated that the shoes which made the footprints had been half-soled. The shoes and the plaster casts were exhibited to the jurors for their own conclusion in that regard. That was not expert testimony. Any nonexpert witness was competent to examine the plaster casts and the corresponding soles of the shoes and draw the conclusion that the line which appeared on the bottom of the plaster cast was caused by the half-soles of the shoes which produced the footprints.

[4] It does not appear that the defendant was restricted in his examination. He was merely precluded from making lengthy statements which were incompetent and not responsive to the questions propounded. He now asserts he desired to explain the presence of lime on the soles of his shoes. We are pointed to no record indicating that competent evidence was excluded or to any offer to prove that the lime which appeared on the soles of his shoes was obtained at a place other than the vicinity of the building which he was charged with burglarizing. The witness was permitted to make lengthy statements which consume many pages in the transcript which have little or no pertinency to the issues of the case. His examination was given undue latitude. There is no merit in the contention that his evidence was unduly restricted.

We find no error in the instructions which were given to the jury. We are pointed to no instruction which was given, and find none in the record, regarding the effect of expert testimony. The jury was very fully and fairly instructed upon every

essential element of the crimes with which the defendant was charged.

[5-7] The court did not err in failing to submit to the jury forms of verdicts predicated on the theory of burglary of the first degree. The respective attorneys stipulated in open court that the record contained no evidence of burglary of the first degree. There is no evidence in the record which would support verdicts of burglary of the first degree. The defendant may not complain of verdicts which are supported by the evidence which are more favorable to him than he deserves. *People v. Novo*, 12 Cal.App.2d 525, 55 P.2d 915, 56 P.2d 560. The jury specifically found that the defendant was "guilty of burglary of the second degree" as to each count of the information.

That finding sufficiently conforms to the requirements of section 1157 of the Penal Code.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



24 Cal.App.2d 462

PRICE v. PRICE (two cases).

Civ. 11623.

District Court of Appeal, Second District,
Division 2, California.

Jan. 20, 1938.

Hearing Denied by Supreme Court
March 21, 1938.

1. Contracts ⚡237(1)

Release ⚡12(1)

An executed oral agreement will serve as a modification or release of a written agreement without regard to presence or absence of a consideration.

2. Husband and wife ⚡279(2)

An executed agreement reducing amounts payable by husband to wife under separation agreement was not ineffective for want of consideration.

3. Marriage ⚡57

The statute specifically relating to a judgment by which the nullity of a marriage is decreed controls over statute concerning judgments in general. Civ.Code, § 82; Code Civ.Proc. § 1908.

4. Husband and wife Ⓒ279(6)**Marriage** Ⓒ65

A judgment of the California superior court annulling a marriage contracted in Mexico by a divorced woman with a person other than her divorced husband was not conclusive as to divorced husband, and hence, regardless of validity of judgment of annulment, divorced husband was not obligated to continue payments to divorced woman under separation agreement after date of divorced woman's remarriage in Mexico, where separation agreement provided for cessation of payments on her remarriage. Civ.Code, § 86.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Berenice Page Price against George E. Price for payments allegedly due under a separation agreement, wherein the defendant filed a cross-complaint for overpayments. Judgment for the plaintiff for less than the amount claimed by her and for the defendant on his cross-complaint, and both parties appeal.

Judgment for the plaintiff reversed, and judgment for the defendant on the cross-complaint affirmed.

Hearing denied by Supreme Court; WASTE, C. J., and CURTIS and EDMONDS, JJ., dissenting.

John L. Huntzinger, of Los Angeles, for plaintiff.

Loeb, Walker & Loeb, of Los Angeles (Henry Duque and Herman F. Selvin, both of Los Angeles, of counsel), for defendant.

WOOD, Justice.

In this litigation a cross-complaint was filed and both parties have appealed. For clarity the parties will be referred to herein as plaintiff and defendant.

A property settlement agreement was made by plaintiff and defendant on September 23, 1925, in the city of New York while they were husband and wife but living separate and apart. In the agreement it was provided that defendant should pay to plaintiff the sum of \$75 per week, and it was further provided that, "in the event of a divorce between the parties, and the remarriage of the wife, all obligations of the husband for her maintenance and support shall cease and determine." After the execution of the agreement plaintiff and defendant were divorced and plaintiff became a resident of the city of Los Angeles. In the year 1934 defendant was in arrears in his pay-

ments and plaintiff went to New York, where she met defendant, and a new agreement was made on July 12, 1934, whereby the amount of the payments to be made were reduced. On March 14, 1936, plaintiff was married to one Bert Bergstedt at Ensenada, Mexico. A decree annulling this marriage was obtained in Los Angeles county on November 16, 1936. By her complaint plaintiff seeks judgment for the payments due her in accordance with the original agreement and defendant by his cross-complaint seeks judgment against plaintiff for the sum of \$650, which was paid to plaintiff before defendant was informed of her remarriage. The trial court rendered judgment in plaintiff's favor for the sum due under the original agreement up to the date of the remarriage of plaintiff. The court also rendered judgment in favor of defendant for the sum paid by him after the remarriage of the plaintiff and before defendant was aware of it.

[1,2] Defendant paid all the sums due in accordance with the original agreement up to July 12, 1934. On that date plaintiff signed and delivered to defendant a written statement as follows: "Thank you very much for the cheque for \$1,625—and also the cash for \$225.00, this clears us up to August 12. Commencing the week of Aug. 13 you are to send me \$50.00 a week until Nov. 1. After that time you are to send me \$150.00 per month as full payment due me." Thereafter all payments were made by defendant and accepted by plaintiff in accordance with the modified agreement and in full satisfaction of the obligations of defendant. The agreement of July 12, 1934, modifying the original agreement has been fully executed. The trial court, on sufficient evidence, found that the original agreement had been modified, but erroneously held that the agreement was not effective for want of a consideration. No consideration was necessary. The rule is that "an executed oral agreement will serve as a modification or release of a written agreement and this too without regard to the presence or absence of a consideration." *Julian v. Gold*, 214 Cal. 74, 76, 3 P.2d 1009, 1010. The judgment in plaintiff's favor is erroneous.

Plaintiff contends that the decree of the Los Angeles court annulling her marriage in Mexico has the effect of placing her in position to demand fulfillment of the obligations of defendant under the separation agreement, notwithstanding the provision

therein that in case of remarriage of plaintiff the obligations of defendant should cease. The trial court held that "by reason of plaintiff taking part in said marriage ceremony above referred to all of the obligations of defendant George E. Price as called for in the written agreement of September 23, 1925, ceased and terminated and since March 15, 1936, defendant George E. Price has been relieved of and from any and all obligations whatsoever to plaintiff provided for in said written agreement."

The right of the courts of a given jurisdiction to annul marriages contracted in foreign states has been often questioned. Much confusion has resulted from the decisions of the courts of the various states and of foreign countries on the subject. In an article appearing in the *Harvard Law Review*, the view is expressed that an annulment should be sought in the courts of the state in which the marriage ceremony was performed. Goodrich, *Jurisdiction to Annul a Marriage*, 32 *Harvard Law Review*, 806; Joseph H. Beale, *Progress of the Law*, 33 *Harvard Law Review*, 1, 12. See, also, 37 *Harvard Law Review*, 150. A contrary view is expressed in an article appearing in 18 *California Law Review*, 105. Two California cases are relied upon in the briefs before us. Defendant relies upon a statement in *Mayer v. Mayer*, 207 Cal. 685, 696, 279 P. 783, 788: "Since the validity of marriages is generally determined by the law of the state where the marriage took place, there are cogent reasons why annulment should be sought in the tribunals of that state." The statement must, however, be classified as dictum. Plaintiff relies upon *McCormack v. McCormack*, 175 Cal. 292, 165 P. 930. That case, however, is not determinative of the question now before us. The parties had been married in Canada and the superior court of the state of Washington entered a judgment declaring the marriage null and void. Later, one of the parties sought a divorce in California. The trial court held that the parties were not husband and wife and denied the divorce. In affirming the judgment our Supreme Court pointed out that the evidence upon which the findings were made was not incorporated in the record, and that the Supreme Court of Washington had upheld the rights of the Washington court to annul the marriage. The court further pointed out that there was nothing in the record showing the grounds upon which the Washington court acted in annulling the contract

of marriage. It was held that since nothing appeared to the contrary it was to be presumed that the action for annulment was based upon some one of the grounds specified in section 82 of the Civil Code as cause for annulling the marriage, and, further, that the judgment of the Washington court was, under the Federal Constitution, entitled to the same consideration and weight as though rendered by a California court.

At the trial the court received in evidence the files in the action in which plaintiff obtained a decree annulling her marriage to Bergstedt. From these files it appears that no appearance was made by Bergstedt and that his default was entered. From the decree it appears that plaintiff and Bergstedt "entered into a purported contract of marriage" before a judicial officer in Mexico, but that neither of them had been domiciled in Mexico; also that one of the witnesses who signed the certificate of marriage was not known to plaintiff before the date of the marriage ceremony. It also appears from the decree that by virtue of the laws of Mexico, "the witnesses whose signatures appear on the marriage certificate must be known to each contracting party, well, and that the witnesses be sure that the contracting parties have no impediments for marriage"; further, that "at least one of the contracting parties be a resident of or domiciled in the judicial district in which said judge officiates"; and further, that if any one of the these requirements be lacking the marriage performed shall be null and void. The provisions of the Mexican law on the subject of the requirements for celebrating marriages, as appears from the decree of annulment, are peculiar to Mexico and are not commonly found in the laws of the American states. At the trial of the present litigation no evidence was received on the subject other than the files of the annulment action. No evidence was offered to prove what took place at the time of the marriage ceremony in Mexico. No evidence was offered to prove the requirements of the Mexican laws, the interpretation given to them by the highest tribunals of Mexico, or the effect of the performance of the marriage ceremony during the period before its annulment by action in court.

Section 82 of the Civil Code of California provides that: "A marriage may be annulled for any of the following causes, existing at the time of the marriage." Then follows a statement of six grounds, or causes, for which the court may decree an-

nulment. The failure to comply with a statutory requirement as to the steps to be taken in celebrating a marriage is not given as a cause for annulment. The section does not authorize the court to grant a decree of annulment for either of the causes for which plaintiff obtained the decree nullifying her marriage to Bergstedt.

[3, 4] Section 86 of the Civil Code provides: "A judgment of nullity of marriage rendered is conclusive only as against the parties to the action and those claiming under them." Plaintiff relies upon section 1908 of the Code of Civil Procedure, which prescribes the effect of judgments. The last-named section, however, concerns judgments in general and must give way to the provisions contained in section 86 of the Civil Code, which relates expressly and specifically to a judgment by which the nullity of a marriage is decreed. Regardless of the question of the right of the superior court in Los Angeles to render a judgment of nullity of the marriage contracted in Mexico in so far as it concerns plaintiff and Bergstedt, a question we consider unnecessary to decide, we are satisfied that the decree is not conclusive as to defendant in the present litigation, is not binding upon him, and does not have the effect of obligating him to carry out the terms of the property settlement agreement.

The judgment in favor of plaintiff for \$2,975 is reversed. The judgment in favor of defendant and cross-complainant for the recovery of \$650 and declaring him to be free from the obligation of supporting plaintiff is affirmed.

We concur: CRAIN, P. J.; McCOMB, J.



24 Cal.App.2d 573

In re BROWN'S ESTATE.

**BROWN v. BANK OF AMERICA NAT.
TRUST & SAVINGS ASS'N et al.**

Civ. 10648.

District Court of Appeal, First District,
Division 2, California.

Jan. 27, 1938.

Hearing Denied by Supreme Court
March 28, 1938.

Executors and administrators Ⓒ509(3)

The Probate Code permitting any person "interested" in an estate to contest the executor's account, and relating to the conclu-

siveness of the order settling the account, apparently includes any beneficiary under a will, and hence includes one admittedly having a contingent future interest. Probate Code, §§ 927, 931.

The word "interest," in its ordinary, accepted meaning, embraces both a vested and a contingent interest, and the word "interested" is defined as having an interest; having a share or concern in some project or affair; involved; liable to be affected or prejudiced; not disinterested.

[Ed. Note.—For other definitions of "Interest" and "Interested," see Words & Phrases.]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the estate of Andrew A. Brown, deceased. Motion by Wallace Brown, opposed by the Bank of America National Trust & Savings Association, as administrator with the will annexed of the estate of Andrew A. Brown, deceased, substituted for Joseph C. Atwood, deceased, as executor, and others, to reopen and examine several accounts of the executor. From an order denying his motion, Wallace Brown appeals.

Reversed.

Weinmann, Quayle & Berry, of Oakland, and George Olshausen, of San Francisco, for appellant.

tum Suden & tum Suden, of San Francisco, for respondents.

SPENCE, Justice.

Prior to final distribution of the above-entitled estate, Wallace Brown, the appellant herein, attained the age of 21 years and made a motion, under section 931 of the Probate Code, to reopen and examine several accounts of the executor which had been filed and settled while appellant was a minor. Said motion was accompanied by specific written exceptions to each of said accounts. The court below summarily denied said motion without a hearing on the merits of said exceptions. This appeal is taken from the order denying said motion.

The issue on this appeal is narrowed to one question, for it is conceded by respondents that in denying the motion the court below "considered only the question of whether or not appellant had such

an interest as entitled him to be heard." Appellant contends that he had such an interest and, in our opinion, this contention must be sustained.

It appears unnecessary to set forth the terms of the will. Appellant was named in the will and for the purpose of this discussion we may accept respondents' description of the nature of appellant's interest created by said will. Respondents state: "It is thus clear that Wallace Brown had and has only a future contingent *interest* in the estate of Andrew A. Brown." (Italics ours.)

Section 927 of the Probate Code provides in part: "Any person interested in the estate may appear and file written exceptions to the account, and contest the same." Section 931 of the same Code provides: "The order settling and allowing the account, when it becomes final, is conclusive against all persons interested in the estate, saving, however, to persons under legal disability, the right to move for cause to reopen and examine the account, or to proceed by action against the executor or administrator or his sureties, at any time before final distribution; and in any such action such order is prima facie evidence of the correctness of the account."

No question is raised concerning the sufficiency of the moving papers to show that appellant was a minor and under legal disability when the several accounts were settled, and no question is raised concerning the sufficiency of the cause shown for reopening and examining said accounts as contained in appellant's written exceptions. The sole question is, therefore, whether one admittedly having a "contingent future interest" in an estate is a person interested in the estate within the meaning of said Code sections. In our opinion, this question must be answered in the affirmative.

The word "interest," in its ordinary, accepted meaning, embraces both a vested and a contingent interest, and the word "interested" is defined as "having an interest; having a share or concern in some project or affair; involved; liable to be affected or prejudiced; * * * not disinterested * * * (Webster's New International Dictionary, 2nd Edition.) We find nothing in said sections to indicate, as contended by respondents, that they were intended to apply only to a person having a vested interest in the estate. On the contrary, the language used therein appears to be sufficiently broad to include within its scope any person named as a beneficiary in the will of the deceased.

Our attention has not been called to any authority directly in point, but the language used in *Garwood v. Garwood*, 29 Cal. 514, supports the view expressed above. The statute, Probate Act 1851, § 234, c. 124, p. 478, considered in that case read: "* * * Any person interested in the estate may appear and file his exceptions in writing to the account and contest the same." In discussing said section, the court said at page 520: "Any doubt as to the question of interest ought to be resolved in favor of the petitioner; and however remote or contingent his interest may be, or, in other words, if he has the appearance of an interest, his right to contest ought not to be denied."

We therefore conclude that appellant was a person interested in the estate within the meaning of said sections, and that the court below erred in summarily denying his motion without a hearing upon the merits of his exceptions to the executor's accounts.

The order is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

10 Cal.2d 628

In re MITCHELL'S ESTATE. ***REEVE et al. v. PHILLIPS et al.****S. F. 15643.**

Supreme Court of California.

Feb. 1, 1938.

Modification Denied March 9, 1938.

1. Wills **561(1)**

A devise to the husband of the testatrix for life with remainder to children of the testatrix of an "orchard and land" on the east side of a creek is not limited to the orchard property, but includes other lands in the vicinity lying east of the creek; the word "orchard" being used in its ordinary signification as meaning the land with the trees thereon and not, as claimed, referring only to the trees.

An "orchard" is defined as a plantation or large inclosure containing fruit trees, a collection of trees cultivated for their fruit or other products; also the inclosure or ground containing such trees or an inclosure or assemblage of fruit or nut-bearing trees.

[Ed. Note.—For other definitions of "Orchard," see Words & Phrases.]

2. Wills **456**

The court in construing a will is not at liberty to read its language with any other than its plain ordinary meaning. Probate Code, § 106.

3. Wills **561(1)**

A devise of land on the east side of a creek covers parcels lying east of the center line of the creek and other parcels lying easterly of the parcels first mentioned.

4. Boundaries **13**

A conveyance which describes land as along a watercourse other than tidewaters or a navigable stream includes the land to the thread or center of the course. Civ. Code, § 830.

5. Wills **561(1)**

The rule that a conveyance describing land as along a watercourse includes the land to the thread or center of the stream applies to a will devising land described as being on the east side of a creek or east of the creek. Civ. Code, § 830.

6. Wills **561(1)**

Under a will devising an orchard and land on the east side of a creek, and also gravel pits on the creek, to the husband for

life with remainder to the children of the testatrix, and naming the husband as residuary legatee, where it appears that the gravel pits are not part of the orchard property, a decree distributing the orchard property to the husband for life and other real estate to him in fee is erroneous as to the gravel pits.

In Bank.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Proceedings on the final account and petition for distribution of John W. Mitchell, executor of Cora E. Mitchell, deceased. From a decree settling the account and ordering distribution, Romaine O. Reeve and others appeal, and Mary Anita Phillips, individually and as administratrix of John W. Mitchell, deceased, has been substituted as respondent.

Affirmed in part, and reversed in part. Prior opinion, 70 P.2d 605.

Bohnett, Hill, Cottrell & Boccardo, of San Jose, for appellants.

Henry E. Monroe and Julia M. Easley, both of San Francisco, and L. F. Hobbs and Edward M. Fellows, both of San Jose, for respondents.

PER CURIAM.

Cora E. Mitchell died in San Jose on December 25, 1928. She left a will naming as legatees and devisees her surviving husband, John W. Mitchell, four children of a previous marriage, Zelma Reeve, Romaine O. Reeve, Vernon J. Reeve, and Mabel I. Yates, and a daughter born of her marriage to Mitchell, Mary Anita Mitchell, now Mary Anita Phillips. John W. Mitchell was appointed executor of her will. In April, 1931, he filed his final account and petition for distribution. A decree settling his account and ordering distribution was entered on October 6, 1931. Zelma Reeve, Romaine O. Reeve, Vernon J. Reeve and Mabel I. Yates appealed from the decree. Since that time John W. Mitchell died and Mary Anita Phillips was appointed administratrix of his estate, and is a respondent here in that capacity as well as in her individual capacity.

In her will Cora E. Mitchell left two parcels of real property to her daughter, Zelma Reeve. To each of her other four children she left a cash legacy of \$5,000 and devised to them, share and share

*Petition for modification denied 76 P.2d 1184.

alike, all her unimproved real property in the city of San Jose. She provided a cash legacy of \$20,000 to John W. Mitchell. She also left to him their home and furnishings in San Jose, and the "prune orchard and land on the east side of the Coyote Creek together with all equipment and farm implements; also the gravel pits on the Coyote Creek" for the term of his natural life with remainder share and share alike to the same four children. John W. Mitchell was named as residuary legatee.

The decree of distribution recites that just prior to her death Cora E. Mitchell paid to each of Romaine O. Reeve, Vernon J. Reeve, Mabel I. Yates, and Anita Mitchell the sum of \$5,000 in lieu of the cash legacy in that amount. The court, considering the legacies adeemed, did not order payment of that sum to each of the legatees named in the will. In accordance with the terms of the will the court ordered the home place and furnishings distributed to John W. Mitchell for life with remainder to the four children named by the will so to receive it. The same disposition was ordered of one additional piece of property containing about sixteen acres situate in Santa Clara county, which, by the description in the decree, shows it to be east of the Coyote creek, and therefore "on the east side of the Coyote Creek" as described in the will. That this 16-acre parcel so distributed to Mitchell for life constitutes the "prune orchard" named in the will is not disputed. All the rest of the known real property specifically devised, with the exception of that devised to Zelma Reeve and the San Jose lots left to the other four children, was ordered distributed to John W. Mitchell in fee.

On this appeal from the decree of distribution it is claimed that the court erred in deciding that the cash legacies to the four children were adeemed; further, that certain of the pieces of real property situated in Santa Clara county and distributed to John W. Mitchell in fee lie on the east side of the Coyote creek and should have been distributed to him for life with remainder to the four children named so to take.

For the purpose of this appeal only the second point need be considered. The question is whether the record presented shows that the court erred in ordering distribution in fee to John W. Mitchell

of certain parcels of land which lie east of Coyote creek and which, if appellants are correct, should have been distributed to him for life only.

The appeal was taken under the provisions of section 953a of the Code of Civil Procedure, as amended. However, we are without the aid of a transcript of the evidence taken at the hearing of the petition for distribution for the reason that the notes of the reporter who attended the hearing and took down in shorthand the testimony of the witnesses were destroyed by fire when the courthouse of the county of Santa Clara was destroyed by fire on May 18, 1931, which was three days after the hearing was had and nearly five months before the decree of distribution was entered. The appellants made numerous attempts without success to be relieved from their unfortunate predicament caused by the fire all to the end that the cause be remanded, the issues be retried, and the litigants as well as this court have the benefit of a transcript of the evidence in the event of a subsequent appeal.

[1] The respondents concede, in fact assert, and the appellants of course agree, that "there is nothing ambiguous or uncertain in the language of the will decreeing to Mitchell for his natural life the prune orchard and land east of Coyote Creek" and the "gravel pits." It is also asserted by the respondents "that the will of said decedent is clear and unambiguous as to its legal construction, but contains a description of a devise of real property to John W. Mitchell for his natural life which is imperfect or incomplete on its face." Then only, say respondents, was it necessary for the court to receive evidence to identify the prune orchard property in order to carry out the terms of the will.

The weakness in the respondents' position lies in the assumption as matter of law that the words "prune orchard and land" embrace within their meaning only land on which the prune trees are planted, and that those words necessarily exclude for life tenancy other land owned by the decedent east of Coyote creek. It is obvious that, in harmony with the respondent's contention, the probate court's conclusion that the only unit east of the Coyote creek which was devised for life was based on its interpretation of the dispositive terms of the will, and that the

word "orchard" referred only to the trees in the orchard and did not include the land in which the roots of the trees were imbedded. The respondents' contention was and is for an interpretation of the language of the will which would restrict the word "land" to the land within the limits of the orchard, and as excluding any other land even though such other land may also be east of Coyote creek.

We are not in accord with the respondents' interpretation of the will. Webster's International Dictionary, 2d Ed., defines "orchard" as "a plantation or large enclosure containing fruit trees." Funk & Wagnall's New Standard Dictionary contains the definition: "A collection of trees cultivated for their fruit or other product: * * * Also, the enclosure or ground containing such trees." In Attorney General v. State Board of Judges, 38 Cal. 291, 296, the word was referred to as signifying "an enclosure or assemblage of fruit or nut-bearing trees." Webster's definition of "an enclosure containing fruit trees" was adopted in Wright v. Sample, 162 Ala. 222, 50 So. 268. An "assemblage" alone, without the connotation contained within the word "enclosure" would signify nothing in relation to an orchard. In truth, we have little need of reference to authority to lead us to the conclusion that the plain meaning to be ascribed to the language used is that the land with the trees thereon constitute the "orchard," and that the testatrix used the word in such ordinary signification and intended to devise to John W. Mitchell for life the orchard and the other land belonging to her lying east of the Coyote creek.

[2] The court is not at liberty to read the language of the will with any other than its plain, ordinary meaning. Probate Code, § 106. Such meaning leads to the conclusion that the testatrix devised to her husband for life not only the orchard property, but the other land owned by her in the vicinity and lying east of Coyote creek. It remains to be seen whether it can be ascertained from the judgment roll that land in the vicinity of the orchard belonging to the testatrix and distributed by the court to John W. Mitchell in fee lies east of Coyote creek.

From the decree of distribution, which is a part of the judgment roll, it appears that there were five other parcels of land in the vicinity of the orchard, and that these other five parcels were distributed to Mitchell in fee. They are designated in

the decree as parcels 5, 6, 7, 8, and 9, and in addition are described by metes and bounds. Parcel 5 contains 125.52 acres and was appraised by the inheritance tax appraiser at \$5,025. The description shows that the north boundary of this tract is the "center line of Coyote River." As this land lies south of the center line of Coyote creek, there is no contention that it was improperly distributed to John W. Mitchell in fee, and the decree should be affirmed as to said parcel 5.

Parcel 7 contains 5.16 acres and was appraised at \$2,500. The description of that parcel, read in conjunction with the descriptions of the other parcels, reveals its position to be east of the center line of Coyote creek and between that line and a tract formerly deeded by Mitchell to Chaves.

Parcel 9 containing about 30 acres was appraised at \$20,000. The courses and distances along a portion of its northerly and easterly boundaries are identical with the courses and distances describing the southerly and westerly boundaries of the 16-acre orchard tract which it in part adjoins. Its easterly boundary extends northerly along the westerly boundary of land formerly deeded by Mitchell to Ridley, the southerly boundary of which forms the northerly boundary of the 16-acre orchard. The north boundary of parcel 9 adjoins a small portion of the southerly boundary of the Chaves tract which adjoins the Ridley tract on the north. The westerly course of the north boundary of parcel 9 is shown to be coterminus with the south boundary of parcel 7. Its continuation is described as "to the most westerly corner of said 5.16-acre tract * * * to the center of the Coyote River in the Easterly line" of the Hellyer tract. The described courses are then southerly along the easterly line of the Hellyer tract and the Gordon tract, along the northerly line of the 125.52-acre tract (shown to be along the center line of the Coyote river), and "thence along the center line of Coyote Creek" certain courses and distances to the point of beginning. It is certain from the descriptions in the decree that this piece of land lies east of the center line of the Coyote creek.

From the described positions of various parcels mentioned in the decree it is discernible that parcel 8, containing 20.6 acres and appraised at \$800, and shown in the decree to lie east of the Chaves and Ridley tracts, also lies east of the Coyote

creek. This tract is also shown to lie along the southwesterly line of the 64.59-acre tract which comprises parcel 6, appraised at \$2,580. Parcel 6 would therefore also lie easterly of the other lands mentioned and of the Coyote creek.

[3] Inasmuch as parcels 7 and 9 lie east of the center line of the Coyote creek, and the other parcels referred to, with the exception of parcel 5 and possibly the gravel pits, lie easterly of parcels 7 and 9, it clearly appears that it was error for the court to hold that only the orchard property was devised to Mitchell for life.

[4, 5] According to the well-established rule, a conveyance which describes land as along a watercourse other than tide water or a navigable stream, will include the land to the thread or center of the course. Civ.Code, § 830; 4 Cal.Jur. 386 and cases cited; *Drake v. Russian River Land Co.*, 10 Cal.App. 654, 103 P. 167; 4 R.C.L. p. 103, and cases cited. This rule should apply in the present case in construing the unambiguous language of the testatrix in devising land either on the "east side" or "east of the Coyote Creek." In accordance with this interpretation the court therefore should have ordered the other land in addition to the orchard, lying east of the Coyote creek, distributed to Mitchell for life.

[6] The record does not indicate what parcel or parcels described contained the gravel pits, but it is apparent from the wording of the will alone that they were not contained within the 16-acre orchard piece distributed to Mitchell for life. Error therefore also appears in the omission to make distribution to Mitchell for life of the lands referred to by the testatrix as the gravel pits.

On a motion for diminution of the record and application for leave to produce additional evidence, the appellants seek to prove certain facts occurring since the fire of May 18, 1931, when the reporter's notes were destroyed, including subsequent attempted orders of the probate court pursuant to an asserted stipulation for a new trial, and other matters. However, in view of our conclusions on the merits of the questions ruled upon herein, and the consequent opportunity of the appellants to secure a retrial of the issues on the hearing of the final account and petition for distribution, we perceive no useful purpose in reciting the facts leading to the filing of the motions or in considering the

questions presented thereby. The motion and the application are therefore denied.

The decree is affirmed in so far as it affects the distribution to John W. Mitchell in fee of said parcel 5 particularly described in the decree; the decree otherwise to stand reversed; neither party to recover costs of appeal.



10 Cal.2d 526

HENRIETTA et ux. v. EVANS et al.

L. A. 16421.

Supreme Court of California.

Jan. 31, 1938.

Rehearing Denied Feb. 24, 1938.

1. Automobiles ⇨242(6)

The burden was on plaintiffs in action for injuries caused by defaulting defendant's negligent operation of codefendants' automobile to prove that he was driving it with codefendants' express or implied permission at time of accident. St.1935, p. 153, § 402.

2. Automobiles ⇨192(1)

A substantial violation of limitations as to place or purpose for which owner of automobile permits use thereof by another terminates owner's original express consent and absolves him from liability for subsequent injuries caused by permittee's negligent operation thereof. St.1935, p. 153, § 402.

3. Automobiles ⇨192(8)

Automobile dealers, permitting conditional sale purchaser of automobile to drive it for sole purpose of coming to town to sign sale contract and have ownership certificate transferred are not liable for injuries caused by such purchaser's negligent operation of automobile after driving past dealer's place of business in such town. St. 1935, p. 153, § 402.

LANGDON and SIENK, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Vincent M. Henrietta and wife against Donald E. Evans, August G. Obernolthe, and August G. Obernolthe &

Son, to recover damages for injuries sustained in an automobile collision. Judgment for plaintiffs, and defendants Obernolthe appeal.

Reversed.

Prior opinion, 68 P.2d 754.

Sarau & Thompson, of Riverside, Frank L. Miller, of Banning, and Roy W. Colegate, of Los Angeles, for appellants.

Reay, Scharf & Reay, of Los Angeles, for respondents.

PER CURIAM.

This is an action to recover damages for injuries sustained in an automobile collision. Defendant Evans, driver of the car, was admittedly negligent, and defaulted. The sole question is whether defendants Obernolthe are liable as owners of the car, under the "driving with consent" law, Vehicle Code section 402, St.1935, p. 153.

The facts are not in conflict. Defendants Obernolthe, father and son, are engaged in the business of selling automobiles at Beaumont, Cal. Defendant Evans was an employee of a water district at Desert Center, some 75 miles away. On January 5, 1933, Evans went to Beaumont and negotiated with the other defendants to buy a Ford car on conditional sale. The total price was \$325, the down payment \$30, and the balance was to be paid at the rate of \$25 per month. Evans paid \$5 as a deposit to hold the car, and was to bring in the rest of the down payment. On January 20, Evans, being on duty and unable to leave, asked Randall, a fellow employee, to take the \$25 due on the down payment and bring him the car. Randall brought the money to August Obernolthe and explained that Evans wanted the car so that he could come into town to sign the necessary papers. Obernolthe gave Randall a receipt for the \$25, and told him he could take the car to Evans at Desert Center, but to tell Evans to return at once to Beaumont to sign the conditional sale contract and have the certificate of ownership transferred. At the trial Obernolthe testified that he gave this permission to Evans to drive the car only for the purpose of coming into Beaumont. This was corroborated by Randall, and there is no evidence to show that Obernolthe had authorized any other purpose or use. Randall drove the car to Desert Center and delivered it to Evans with these instructions. Evans told Randall he would

leave at once for Beaumont, and he took the car and drove there, stopping at Indio for a short time for drinks. Arriving at Beaumont, according to his testimony, at about 1:30 or 2 p. m., he saw nobody in the Obernolthes' place of business and drove past without stopping, continuing on the way to Colton, where the collision occurred. Obernolthe testified that he had waited for Evans the preceding evening and nearly all the following day, and was only absent for short periods.

[1] The case was tried without a jury, and judgment went for plaintiffs. It is conceded that title to the car did not pass by the transaction, and accordingly defendants Obernolthe are liable if at the time of the accident Evans was operating the car with their express or implied permission. The burden, however, is on the plaintiffs to prove such permission. *Bradford v. Sargent*, 135 Cal.App. 324, 27 P. 2d 93; *Ewer v. Coppe*, 199 Minn. 78, 271 N.W. 101. In the instant case the car was voluntarily entrusted to Evans by the owners, but it is clear that the permission was merely to drive the car to Beaumont, to sign the papers and complete the sale. There is no evidence to show authorization to use the car for any other purpose or to drive it to any other place; on the contrary, the only testimony in the record is to the effect that any other use was expressly prohibited. We have, therefore, a case of an original permission for a limited use, the scope of which was exceeded; and the question is whether the original express consent terminated prior to the accident by reason of the violation of the limitation.

[2] The cases uniformly hold that, where the permission is granted for a limited time, any use after the expiration of the period is without consent, and the owner is not liable, unless the circumstances justify an inference of implied consent to further use. *Bradford v. Sargent*, supra; *Di Rebaylio v. Herndon*, 6 Cal. App.2d 567, 44 P.2d 581; *Union Trust Co. v. American Commercial Car Co.*, 219 Mich. 557, 189 N.W. 23.

The courts in this state have not yet definitely determined whether this same rule applies where permission is granted for use in a particular place or locality, or for a particular purpose, and the limitation is exceeded. On principle, there is no fundamental ground of distinction between a limitation of time and one of pur-

pose or place, in so far as permission is concerned; and it would seem clear that a substantial violation of either limitation terminates the original express consent and makes the subsequent use without permission. For example, an owner might entrust his car to another for the purpose of driving it to his home, or to a garage for repairs; and, if the driver took the car out on a pleasure trip, it could hardly be contended that he was acting with the permission of the owner. On the other hand, if the owner permitted the use of the car for a particular purpose or in a certain locality, though he gave specific instructions as to the manner of operation, the speed and care in driving, etc., it would not be reasonable to hold that the use was without permission if any of these detailed instructions were violated, for in such case the liability of the owner could in almost every case be defeated by some showing of violation of authority. See *Arcara v. Moresse*, 258 N.Y. 211, 179 N.E. 389; *Chaika v. Vandenberg*, 252 N.Y. 101, 169 N.E. 103.

This analysis has been made in cases from other jurisdictions, which have developed a doctrine analogous to the rule of deviation in the cases dealing with liability of the employer for negligence of the employee. They hold that the substantial violation of limitations as to locality or purpose of use operate in the same manner as violation of time limitations, absolving the owner from liability. See *Heavilin v. Wendell*, 214 Iowa 844, 241 N.W. 654, 83 A.L.R. 872; *Abbey v. Northern States Power Co.*, 199 Minn. 41, 271 N.W. 122; *Rowland v. Spalti*, 196 Iowa 208, 194 N.W. 90; *Chaika v. Vandenberg*, supra; *Arcara v. Moresse*, supra; note, 21 Minn.L.Rev. 823, 830. The rule and its qualifications are clearly expressed in *Chaika v. Vandenberg*, supra, where the court said (252 N.Y. 101, 169 N.E. 103, 104):

"Here, according to the testimony of the defendant, he had given his son permission to use the automobile only on Long Island. When the accident occurred the son was operating the car in New York City. The restricted permission did not cover such use. At that time the son was operating the car illegally and without the assent of the owner.

"A different question would arise if the son had received permission to use the car but had deviated from the owner's

instructions as to the manner in which the car was to be used or the route to be taken. Deviation by an employee from the strict line of his employer's business or from his directions may not put the employee's act outside of the scope of his employment; so deviation even from the terms of permission to use the car might conceivably be insufficient, of its own force, to terminate the permission and render the use of the car illegal."

[3] These authorities are, in our opinion, sound, and the result reached is in conformity with the object of the statute. The instant case falls within the rule of these decisions, and it follows that, under the facts appearing in the record, liability cannot be imposed upon defendants Obernolthe.

The judgment is reversed.

LANGDON, Justice (dissenting).

I dissent. I am entirely in accord with the principles of law stated in the majority opinion, and, as applied to the facts appearing therein, the conclusion reached cannot be challenged. But the statement that the facts are without conflict is not borne out by the record. There is a real conflict as to the scope of the permission given to drive the car, and the evidence is such that the trial court was warranted in drawing the inference that the driving at the time of the collision was with the express or implied consent of defendants.

Neither Randall nor Evans corroborated Obernolthe's statement that Evans was authorized to drive only to Beaumont and nowhere else. Evans testified: "The best I recall the conversation with Mr. Randall at that time was, I was figuring on going on home and he told me to be sure and stop in and sign the contract as I went through Beaumont." And Randall's testimony was: "He told me to take the car out to him to Desert Center and for him to return it immediately and sign the papers at Beaumont." All the witnesses agree that Evans was instructed to drive to Beaumont at once and, while there, to sign the papers; but there is no testimony save that of Obernolthe that the permission to use the car was to cease upon arrival at Beaumont, regardless of the circumstances. Evans' testimony, on the other hand, is to the effect that he was authorized to drive the car, but to stop at Beaumont to complete the transaction; and this testimony is consistent with the in-

ference to be drawn from the receipt calling for the \$25 balance of the down payment "at time of delivery." There were, moreover, some inconsistencies and uncertainties tending to discredit Obernolthe's testimony, e. g., he was mistaken as to the person from whom he originally acquired the car, and as to the date that he prepared the "pink slip."

In this state of the record the trial court was justified in drawing the inference that the express permission granted by Obernolthe sufficiently covered the use under the circumstances of the instant case.

I think the judgment should be affirmed.

I concur: SHENK, J.



10 Cal.2d 581

**PACIFIC GAS & ELECTRIC CO. v.
SCOTT et al.**

Sac. 5083.

Supreme Court of California.

Feb. 1, 1938.

Rehearing Denied Feb. 24, 1938.

1. Appeal and error ⇨544(3)

Where, on appeal from judgment, reporter's transcript was not filed because of appellant's failure to deposit cost of transcription of testimony, but judgment roll was filed in Supreme Court, motion to dismiss appeal was denied and appellant was entitled to consideration of appeal based on judgment roll. Code Civ.Proc. § 953a, as amended.

2. Waters and water courses ⇨45

Where lower riparian owner operated hydroelectric plant, and upper riparian owners, who were engaged in hydraulic placer mining, caused river to be filled with debris so that lower owner's power generating apparatus was damaged, and mining was a minor industry in the district, and carriage of mining debris was not the sole use of the river, lower owner could recover damages against upper owners for the damage caused by the debris and could enjoin upper owners from further discharging debris into river.

3. Waters and water courses ⇨42

An owner of upper riparian placer mining land, whether prior or subsequent, has no right to permit foreign substances to be washed onto land of lower owner and cause damage to lower owner's property.

4. Negligence ⇨28

The law that one may not use his own property so as to cause damage to or destruction of his neighbor's property governs, whatever may be the use of the land, and custom may not be invoked to excuse or justify such damage or destruction.

5. Venue ⇨16

Where realty of lower riparian owner which was damaged by upper riparian owners' discharging of debris into river was located in two counties, and upper owners' lands were located only in one of the counties, lower owner could bring action for damage to the property in either county notwithstanding upper owners' lands did not lie therein. Code Civ.Proc. § 392.

6. Appeal and error ⇨193(8), 1033(8)

Where lower riparian owner recovered judgment for property damage caused by discharge of debris into river by upper riparian owners, and damages were apportioned among upper owners, apportionment could not be objected to for first time on appeal, since if upper owners were joint tort-feasors, apportionment was advantageous to them, and if they were separate tort-feasors, objection was waived by not having been made by demurrer or answer. Code Civ.Proc. § 434.

In Bank.

Appeal from Superior Court, Placer County; Ernest Weyand, Judge.

Action by the Pacific Gas & Electric Company against J. W. Scott and the You Bet Mining Company and others for damage to plaintiff's power generating apparatus which was caused by defendants' hydraulic placer mining operations, which were conducted above plaintiff's property and which discharged debris into the river. From a judgment for plaintiff for \$232,655.54, and also enjoining defendants, the named defendants appeal.

Affirmed.

James F. Peck and Elizabeth M. Maxwell, both of San Francisco, for appellants You Bet Mining Co. and J. W. Scott.

Robert M. Searls, of San Francisco, for defendants W. W. Mein and Catherine Broyles.

Vernon Stoll, of Grass Valley, for defendants Remington Hill Placers, Inc., Ltd., and Frank A. Crampton.

J. B. Zimdars, of San Francisco, for defendant D. B. Fuller.

Thomas J. Straub and W. R. Dunn, both of San Francisco, and T. L. Chamberlain and Orrin J. Lowell, both of Auburn, for respondent.

SHENK, Justice.

The plaintiff, a public utility corporation, owns certain parcels of real property in Nevada and Placer counties which are riparian to Bear river. For approximately ten years prior to the commencement of the action, it has maintained a system of canals, power houses, and regulating reservoirs through which, under its riparian and appropriative rights, waters from Bear river are diverted and used in the generation of electric energy sold by the plaintiff to the public. The waters of the river are also sold to several small communities, to the Nevada Irrigation District, and to the cities of Roseville and Lincoln for irrigation and domestic uses. The defendants within three years of the filing of the action commenced hydraulic placer mining operations above the points of diversion of water by the plaintiff. Their operations washed down tailings and detritus through the channel of the river and into the diversion and distributing system of the plaintiff, with the result that quantities of earth, sand, gravel, "slickens," filth, débris, colloidal matter, and foreign substances were discharged into the reservoirs, canals, and power generating apparatus and caused serious damage thereto. The action was brought against several defendants who operated various mining properties above the lands of the plaintiff. The court found damage to the plaintiff's property in excess of \$232,655.54, but that the plaintiff had remitted the excess. It also found the proportions of that amount contributed by the several defendants and entered its judgment accordingly, viz.: Against You Bet Mining Company and J. W. Scott for \$126,928.57; Liberty Hill Gold Mines, Limited, and M. A. Grizzle for \$16,880.40; R. P. M. Davis, Liberty Hill Gold Mines, Limited, and M. A. Grizzle for \$83,970.57; D. B. Fuller, for \$646, and Remington Hill Placers, Inc., Limited, Frank A. Crampton

and others, for \$4,240. Injunctive relief was also granted. The defendants You Bet Mining Company and J. W. Scott only have appealed from the judgment.

[1] The appeal was taken pursuant to the provisions of section 953a of the Code of Civil Procedure, as amended. A clerk's transcript consisting of the judgment roll was filed. Proceedings for preparation of the reporter's transcript were terminated in the trial court for failure of the appellants to deposit the cost of transcription of the testimony. A reporter's transcript therefore was not filed. The respondent moved this court to dismiss the appeal on the ground that the reporter's transcript had not been filed. The motion was denied. Inasmuch as a judgment roll is on file herein, the appellants are entitled to a consideration of the appeal based thereon. *Ramsey v. Rodgers*, 189 Cal. 100, 207 P. 516.

The respondent also moved to dismiss the appeal or affirm the judgment on the ground of the claimed frivolous and insubstantial nature of the points raised by the appellants. That motion was continued for consideration with the appeal on its merits. The latter motion and the appeal are now before us for determination.

[2] The appellants, who will be referred to as the defendants, contend that this controversy as between them and the plaintiff is between placer miners, and that the law and customs governing the correlative rights of placer miners in a placer mining district govern its disposition. The defendants contend that it appears from the judgment roll that the plaintiff's rights originated and continued to be those of a placer miner, and that a lower placer miner has no right to have the stream come down to him free of the washings, tailings, and detritus of an upper placer miner. It is urged that not only are the defendants not liable to the plaintiff for the damage done to the latter's property by their placer mining operations, but that the plaintiff, if it desires the water to come down to it free from the tailings washed from the defendants' mines, must compensate the defendants for the taking of that use. The court did not find that the lands of the plaintiff and the defendants were useful only for mining purposes. The defendants, however, invoke the judicial knowledge of the court that the lands are in a placer mining district, and have been so surveyed, returned, and

approved by the United States government. The court upon the evidence before it found that the lands of the defendants were not situate in a mining district, or in a district where placer mining constitutes the major industry, and that the carriage or storage of mining débris was not the sole or economic use or value of the channel of Bear river. The finding continues: "Placer mining was the major industry at one time prior to the issuance of injunctions against hydraulic mining but since said time and after about 1890 mining in said district has dropped off and become a very minor industry as compared with other industries and the use of said district as a collecting area for public power and irrigation water supply purposes and for conducting such water supply through said Bear river and its tributaries to public uses. Said latter industries and those dependent upon them render the mining operations of defendants and others in the district infinitesimal in comparison both in importance and amounts invested." The findings also disclose that the mining properties of the defendants did not contain gold in quantities or values capable of being worked profitably by hydraulic or any ground sluicing process, and that the properties were not of any value for such purposes. The court further found that the plaintiff could not obviate the effect of the defendants' operations by any reasonable expenditure.

[3,4] The foregoing and related findings of the court, which also show that the defendants had no prior or prescriptive rights as against the plaintiff to discharge washings from its mining operations into the channel of Bear river, answer all of the defendants' major contentions. It appears to be the law of this state that an owner of upper placer mining land, whether prior or subsequent, has no right to permit tailings, detritus, and foreign substances to be washed onto the land of any lower proprietor or mine operator and cause damage to his property. The law that one may not use his own so as to cause damage to or destruction of his neighbor's property governs, whatever may be the use of the land, and "custom" may not be invoked to excuse or justify such damage or destruction. *Hill v. King*, 8

Cal. 336; *Pilot Rock Creek Canal Co. v. Chapman*, 11 Cal. 161; *Esmond v. Chew*, 15 Cal. 137, 143; *Hill v. Smith*, 27 Cal. 476; *Robinson v. Black Diamond Coal Company*, 57 Cal. 412, 40 Am.Rep. 118; *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138, 151, 4 P. 1152, 56 Am.Rep. 80; *Junkans v. Bergin*, 67 Cal. 267, 7 P. 684; *Dripps v. Allison's Mines Co.*, 45 Cal. App. 95, 187 P. 448; *Henderson v. Western Precipitating Co.*, 10 Cal.App.2d 18, 51 P.2d 126. All questions of fact bearing upon the nature and extent of the operations of the defendants and the correlative rights of the parties, considering the use to which each has put his land, have been resolved against the defendants. The court's conclusions on the facts found show that the law was correctly applied.

[5] The action herein was commenced and prosecuted to judgment in Placer county. The defendants contend that the action should have been commenced in Nevada county because the lands of the defendants are situate in that county. A sufficient answer is that the complaint shows that the lands of the plaintiff are situate in Nevada and Placer counties. The Bear river flowing through those lands forms the boundary between the two counties. Inasmuch as a portion of the real property involved in the action was situate in Placer county, the action was properly commenced in that county. Section 392, Code Civ.Proc.

[6] Finally the defendants contend that the court could not apportion the damages among the defendants. If the defendants were joint tort-feasors, the apportionment was advantageous to the defendants, since otherwise each would be answerable to the plaintiff for the full amount of the damage. If the defendants were separate tort-feasors, then any specific appropriate objection should have been made by demurrer or answer, otherwise it is deemed to have been waived. Section 434, Code Civ. Proc. The record indicates that the specific objection is made here for the first time.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; EDMONDS, J.

10 Cal.2d 578

BARTON v. BARTON et al.
L. A. 16449.

Supreme Court of California.

Feb. 1, 1938.

1. Appeal and error ⇨640

Where an appeal was based on a printed transcript containing a 30-page partial judgment roll, including pleadings, findings, and judgment, certified by clerk, stipulated to by counsel, and allowed and settled by trial judge, and in a form satisfying statutory requirements and rules of court, a motion to dismiss appeal for failing to file a properly certified transcript would not lie.

2. Frauds, statute of ⇨144

That husband had written letters to wife prior to marriage and had destroyed them did not create a presumption that the letters contained evidence adverse to him, so as to estop him from relying upon the statute of frauds as a defense to the enforcement of an oral antenuptial settlement, where trial court found that the letters were of a social and sentimental nature, and that they did not contain any memorandum of the agreement. Civ.Code, §§ 178, 179; Code Civ.Proc. § 1973, subd. 3.

In Bank.

Appeal from Superior Court, Los Angeles County; Wm. J. Palmer, Judge.

Action by Eva G. Barton against J. H. Barton and others to enforce an alleged prenuptial agreement in consideration of her marriage to named defendant. Judgment for defendants, and plaintiff appeals.

Affirmed.

Porter C. Blackburn, of Los Angeles, for appellant.

Hibbard & Kleindienst and H. P. Hibbard, all of Los Angeles, for respondents.

WASTE, Chief Justice.

[1] This cause is presented upon a motion by defendants to dismiss the appeal of plaintiff or to affirm the judgment. The motion is made upon two grounds: (1) That the appeal should be dismissed for failure to file a properly certified transcript, or (2) the judgment should be affirmed because the appeal presents no substantial question.

The first point is without merit. The printed transcript contains a thirty-page

partial judgment roll, including pleadings, findings, and judgment, certified by the clerk and stipulated to by counsel, and also a bill of exceptions, stipulated to by counsel, and allowed and settled by the trial judge. The transcript is in a form which sufficiently satisfies statutory requirements and the rules of this court.

[2] The second contention must be sustained. Plaintiffs sought by this action to enforce an alleged prenuptial agreement which she alleged was made in consideration of her marriage to defendant J. H. Barton, and pursuant to which allegedly she should have acquired a one-half interest in all property which he owned as of July 26, 1934, date of their marriage.

The trial court found that prior to the marriage of plaintiff and said defendant, certain oral promises (not thereafter kept) were made by him to her, but that said defendant did not make such promises with the intention to deceive or defraud plaintiff, or as a material inducement to plaintiff in bringing about the marriage; that there was never executed between plaintiff and said defendant any written agreement or written memorandum of any agreement made upon consideration of marriage, or as a contract for marriage settlement, as referred to in sections 178 and 179 of the Civil Code, and subdivision 3 of section 1973 of the Code of Civil Procedure; that plaintiff's claims were barred by the provisions of those sections, and that no estoppel existed for her benefit which denied said defendant the right to rely upon the statutes in defense of plaintiff's alleged cause of action. These findings were followed by entry of judgment in favor of defendants.

Plaintiff appealed from the judgment. She urges two main contentions, which she has argued under several headings; that is, she contends, first, that the evidence does not justify the findings, and, second, that defendant is estopped to plead the above-cited statutes as a defense to the action.

The first contention is without merit. The evidence affords ample support for the findings and conclusions of the trial court. Neither can the second contention be upheld. Plaintiff claimed that letters written to her by defendant J. H. Barton contained a note or memorandum of the alleged prenuptial agreement sufficient to satisfy the statute of frauds, and that as those letters were destroyed by said defendant, he did not come before the court

with clean hands, and it should have been presumed that the letters contained evidence adverse to him; that therefore he was estopped to rely upon the statute of frauds as a defense. The answer to this claim is that the trial court expressly found the following facts: That "plaintiff went to the City of Seattle * * * for a visit and that while there many letters were exchanged between plaintiff and the defendant J. H. Barton, which the court finds were solely of a social and sentimental nature and were intended as such. The court finds that plaintiff failed to meet the burden of proof of establishing that said letters or any of them * * * contained any promise or agreement on the part of the defendant J. H. Barton to transfer his property in joint tenancy between plaintiff and defendant J. H. Barton upon their marriage and the court finds that no such letter, nor any letter, written by J. H. Barton to plaintiff contained any memorandum of any such promise or agreement, nor of any similar promise or agreement." The evidence supports these findings.

The judgment is affirmed.

We concur: SHENK, J.; LANGDON, J.; CURTIS, J.; EDMONDS, J.; SEAWELL, J.; HOUSER, J.



10 Cal.2d 567

PACIFIC EMPLOYERS INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 15785.

Supreme Court of California.

Jan. 31, 1938.

Rehearing Denied Feb. 24, 1938.

1. Workmen's compensation ☞99

Where at time employee was injured in California, he was a resident of Massachusetts, was employed there, was subject to direction of officers of employer there located, his salary was paid to him in that state, and he had come to California only on a specific errand for his employer, employee held entitled to recover compensation under the California Compensation Act, where medical and hospital expenses were incur-

red in California and had not been paid at the time of hearing, since it would be obnoxious to California governmental policy to require physicians and hospitals to go to Massachusetts to collect charges for medical treatment if employee were denied compensation under the California law. St. 1917, p. 831, as amended; Const. art. 20, § 21, amended in 1918; Stat. 1929, p. 1420, § 9(a); G.L.(Ter.Ed.) Mass. c. 152.

2. Workmen's compensation ☞996

An award for medical expense cannot be made in favor of a physician in a proceeding to which the injured employee is not a party, but a physician who has rendered medical aid to a compensable employee may maintain an application to recover the value of his services in a proceeding in which both the employer and employee are named as defendants. St. 1917, p. 831, as amended.

3. Workmen's compensation ☞996

A "physician who has rendered medical aid to an employee" is a "party in interest" in compensation proceedings, since effective administration of the Workmen's Compensation Act requires and assures adequate medical care. St. 1917, p. 831, as amended; St. 1929, p. 1420; Const. art. 20, § 21, amended in 1918.

[Ed. Note.—For other definitions of "Party in Interest" and "Physician," see Words & Phrases.]

In Bank.

Proceeding by the Pacific Employers Insurance Company against the Industrial Accident Commission of California and Kenneth Tator to annul a compensation award made by the Industrial Accident Commission, on ground that at the time of the injury the employee was subject to the Workmen's Compensation Law of Massachusetts.

Award affirmed.

W. N. Mullen, of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondent Industrial Accident Commission.

Keith & Creede, of San Francisco, for respondent Kenneth Tator.

Hartley F. Peart and Howard Hassard, both of San Francisco, for certain physicians who rendered medical services to respondent Tator.

EDMONDS, Justice.

The petitioner, by this proceeding for review, seeks to annul an award of compensation made by the Industrial Accident Commission upon the ground that, at the time the employee was injured, he was subject to the Workmen's Compensation Law of Massachusetts. G.L.(Ter.Ed.) Mass. c. 152. The defense of the insurer is that Massachusetts has exclusive jurisdiction of the controversy.

Dewey & Almy Chemical Company is a Massachusetts corporation, licensed to do business in California. Its principal offices are in Cambridge, Mass., and one of its several factories is at Oakland, Cal. The business of the company is managed by its executive officers in Massachusetts, and a research laboratory is maintained there.

Kenneth Tator, the injured employee, formerly lived in Portland, Ore. He left there to attend Massachusetts Institute of Technology, from which he graduated. Since January, 1930, he has been employed by the Dewey & Almy Company as chemical engineer and research chemist. The contract of employment (which is in writing but does not appear in the record) was made in Cambridge, and Mr. Tator has worked there in the company's research laboratory, except at various times when he has been sent elsewhere on company business.

In September, 1935, one of the principal customers of the company made a complaint about a chemical compound manufactured at the Oakland plant. Following a conference in New York between officers of the company and this customer, the company's general manager ordered Mr. Tator, then at the laboratory in Cambridge, to go to Oakland and investigate the situation. Mr. Tator did so, and suggested several changes in the machinery of the plant. The evidence shows that he made written reports from time to time concerning his work. These reports were addressed to the manager of the Oakland plant, but copies were sent to the home office in Cambridge, and Mr. Tator received comments and suggestions from his superiors there.

It is clear that throughout this time he was subject to the control and direction of the officers of the company at Cambridge, although his method of procedure was subject to the approval of the manager of the Oakland factory, who assigned him a place

to work, named men to assist him, and had limited authority to accept or reject the suggestions he made regarding changes in equipment. However, these were matters of detail. Mr. Tator had been sent to Oakland to find out why the company's product manufactured there did not meet requirements, and to remedy the difficulty. His status in California is defined very clearly by his own testimony. Speaking of the trouble at the Oakland plant, he said: "I was brought out there to solve the thing by my technical knowledge if I could. * * * I was advising the Oakland Branch from a technical standpoint. * * * When I had found the trouble and rectified it, I was to * * * notify Cambridge and await orders. * * * There was no thought of staying out here permanently."

While he was in California Mr. Tator remained on the pay roll of the company in Massachusetts and his salary as it accrued was deposited to his account in a bank in Massachusetts. He was given an advance before he left Cambridge to meet his traveling and other expenses in California, and a further sum was advanced to him by the Oakland office. At the time of the hearing these expenses had been billed to the Oakland office and the local manager understood that a charge would later be made for Mr. Tator's salary while he was in California.

At the time of Mr. Tator's injury, the Dewey & Almy Company carried workmen's compensation insurance covering its operations in Massachusetts and also in California. The Hartford Accident & Indemnity Company insured it by a policy under which the obligations of the insurer include the Workmen's Compensation Law of Massachusetts, G.L.(Ter.Ed.) c. 152, "and none other." This policy names Cambridge and Walpole, Mass., as the location of all work places of the employer. A policy issued by the petitioner insured the chemical company against the obligations imposed by the California Workmen's Compensation, Insurance and Safety Act of 1917, St.1917, p. 831, as amended and names the workplaces of the employer as the factory in Oakland "and elsewhere in the State of California."

After being injured, Mr. Tator made an application to the Industrial Accident Commission of California for compensation, naming Dewey & Almy Chemical Company as his employer and the petitioner as the employer's insurance carrier.

The latter filed an answer denying the jurisdiction of the commission to determine the claim for the reason that he was an employee of Dewey & Almy Chemical Company in its operations in the state of Massachusetts and was not covered by the workmen's compensation insurance policy of the petitioner. It is further alleged: "That the applicant is a resident of the State of Massachusetts and entered his employment therein, and not having rejected the extraterritorial effect of the Workmen's Compensation Act of the State of Massachusetts, thereby did elect, in the event of injuries sustained by him outside the confines of the State of Massachusetts, to accept the benefits of said State, and such an agreement was a part of his contract to hire."

Prior to the hearing the Hartford Company was joined as a defendant. The commission found that Mr. Tator sustained injury at Oakland, Cal., while employed as a chemical engineer "by the Pacific factory of the Dewey & Almy Chemical Company, a Massachusetts corporation." It determined that this injury caused permanent disability which it rated at 42¼ per cent. of total, and awarded compensation therefor against the petitioner. It also found that the Hartford Accident & Indemnity Company was not the insurance carrier of the employer and dismissed it and the employer from all liability.

The Workmen's Compensation Law of Massachusetts provides: "An employee of an insured person shall be held to have waived his right of action at common law or under the law of any other jurisdiction in respect to an injury therein occurring, to recover damages for personal injuries if he shall not have given his employer, at the time of his contract of hire, written notice that he claimed such right. * * * If an employee who has not given notice of his claim of common law rights of action, under section twenty-four, or who has given such notice and has waived the same, receives a personal injury arising out of and in the course of his employment, or arising out of an ordinary risk of the street while actually engaged, with his employer's authorization, in the business affairs or undertakings of his employer, and whether within or without the commonwealth, he shall be paid compensation by the insurer, as hereinafter provided, if his employer is an insured person at the time of the injury; provided, that as to an injury occurring

without the commonwealth he has not given notice of his claim of rights of action under the laws of the jurisdiction wherein such injury occurs or has given such notice and has waived it." Sections 24, 26. It is conceded that no notice was given by Mr. Tator pursuant to the provisions of this law and the petitioner asserts that under such circumstances Massachusetts has exclusive jurisdiction to award compensation for the injury.

In the leading case of *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145, 52 S.Ct. 571, 574, 76 L.Ed. 1026, 82 A.L.R. 696, an employee of a Vermont corporation was killed while working in New Hampshire. He resided in Vermont and had been employed in that state as a lineman for emergency service either there or in New Hampshire. The accident occurred when he was sent to the New Hampshire substation to make some repairs. The employer, invoking the full faith and credit clause, set up a special defense: It pleaded that the action was barred by the provisions of the Workmen's Compensation Act of Vermont which, as in effect at the time of the accident, provides that a workman hired within the state shall be entitled to compensation for an injury received either within or without the state; that "employers who hire workmen within this state to work outside of the state, may agree with such workmen that the remedies under the provisions of this chapter shall be exclusive as regards injuries received outside this state by accident arising out of and in the course of such employment, and all contracts of hiring in this state shall be presumed to include such an agreement." G.L. Vt. 5774. The act also stipulates that every contract of employment made within the state shall be presumed to be subject to its provisions unless prior to the accident an express statement to the contrary shall have been made by one of the parties, and that acceptance of the act is "a surrender by the parties * * * of their rights to any other method, form or amount of compensation or determination thereof." Section 5763. Neither the employer nor the employee filed any statement declining to accept any provision of the Vermont act.

In determining that the rights of the employer and the representative of the dead employee were fixed by the law of Vermont and that the action in New Hampshire could not be maintained, the court said: "The administratrix contends that the full faith and credit clause is not applicable. The argument is that to recognize the Vermont act as

a defense to the New Hampshire action would be to give to that statute an extra-territorial effect, whereas a state's power to legislate is limited to its own territory. It is true that full faith and credit is enjoined by the Constitution only in respect to those public acts which are within the legislative jurisdiction of the enacting state. See *National Mutual Bldg. & Loan Ass'n v. Brahan*, 193 U.S. 635, 647, 24 S.Ct. 532, 48 L.Ed. 823; *Olmsted v. Olmsted*, 216 U.S. 386, 395, 30 S.Ct. 292, 54 L.Ed. 530, 25 L.R.A.,N.S., 1292. But, obviously, the power of Vermont to effect legal consequences by legislation is not limited strictly to occurrences within its boundaries. It has power through its own tribunals to grant compensation to local employees, locally employed, for injuries received outside its borders, compare *Quong Ham Wah Co. v. Industrial Accident Comm.*, 255 U.S. 445, 41 S.Ct. 373, 65 L.Ed. 723, dismissing writ of error, 184 Cal. 26, 192 P. 1021, 12 A.L.R. 1190; and likewise has power to exclude from its own courts proceedings for any other form of relief for such injuries. * * * The answer is that such recognition in New Hampshire of the rights created by the Vermont act, cannot, in any proper sense, be termed an extraterritorial application of that act. * * * The relation between Leon Clapper and the company was created by the law of Vermont; and as long as that relation persisted its incidents were properly subject to regulation there, for both Clapper and the company were at all times residents of Vermont; the company's principal place of business was located there; the contract of employment was made there; and the employee's duties required him to go into New Hampshire only for temporary and specific purposes, in response to orders given him at the Vermont office. The mere recognition by the courts of one state that parties by their conduct have subjected themselves to certain obligations arising under the law of another state is not to be deemed an extra-territorial application of the law of the state creating the obligation. Compare *Canada Southern Ry. Co. v. Gebhard*, 109 U.S. 527, 536, 537, 3 S.Ct. 363, 27 L.Ed. 1020. By requiring that, under the circumstances here presented, full faith and credit be given to the public act of Vermont, the Federal Constitution prevents the employee or his representative from asserting in New Hampshire rights which would be denied him in the state of his residence and employment. * * * The interest of New Hampshire was only casual. Leon Clapper was not a

resident there. He was not continuously employed there. So far as appears, he had no dependent there. It is difficult to see how the state's interest would be subserved, under such circumstances, by burdening its courts with this litigation."

In the later case of *Ohio v. Chattanooga Boiler & Tank Co.*, 289 U.S. 439, 53 S.Ct. 663, 665, 77 L.Ed. 1307, the employer was a Tennessee corporation and the dead employee had been a resident of that state and had been hired there. The accident for which compensation was claimed occurred in Ohio. That state, after paying an award of compensation from its insurance fund, brought an original action against the employer to recover the amount of its payment. In defense, the employer relied upon a provision of the Tennessee Workmen's Compensation Law, Code Tenn.1932, § 6859, that "the rights and remedies herein granted to an employee subject to this Act [chapter] on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, dependents, or next of kin, at common law or otherwise, on account of such injury or death." However, in giving judgment for Ohio, the Supreme Court pointed out that this statute, as construed and applied by the highest court of Tennessee, did not preclude recovery under the law of another state "and the full faith and credit clause does not require that greater effect be given the Tennessee statute elsewhere than is given in the courts of that state."

The principles stated in the Clapper Case were followed and applied in *Cole v. Industrial Commission*, 353 Ill. 415, 187 N.E. 520, 90 A.L.R. 116. There the employee, who was injured while at work in Illinois, was a resident of Indiana and was hired there by contractors who resided and had their principal place of business in that state. The Indiana law, Burns' Ann.St. Supp.Ind.1929, § 9451, provided that the rights and remedies "granted to an employee subject to this act on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account of such injury or death." The court held that as the contract of employment was made in the state of Indiana between parties who were subject to the terms of the Workmen's Compensation Law of that state, the remedy provided by it was an exclusive one.

The more recent case of *Alaska Packers Ass'n v. Industrial Accident Commission*, 294 U.S. 532, 55 S.Ct. 518, 524, 79 L.Ed. 1044, presents another application of the full faith and credit clause. In that case an employee who had been hired in California for seasonal work in Alaska recovered compensation under the California law, in spite of a contract made by him in which he elected to be bound by the law of Alaska. This award was affirmed. At the time of the injury, which occurred in Alaska, the California law, St.1917, p. 870, § 58, provided: "The [industrial accident] commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this state in those cases where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state." This statute, the court said, came in conflict with the statute of Alaska, and such a conflict is to be resolved "not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight."

The case of *DeGray v. Miller Bros. Construction Co.*, 106 Vt. 259, 173 A. 556, also recognizes the public policy of the forum as controlling. The court said that when a person employed in another state is injured in Vermont, its courts, either upon the principles of comity or under the full faith and credit clause, usually will decline to take jurisdiction if the contract of employment does not conflict with the law and public policy of Vermont. But it was held in *Esau v. Smith Bros.*, 124 Neb. 217, 246 N.W. 230, that the full faith and credit clause must yield to the public and domestic policy of the state which is asked to enforce the constitutional provision.

In considering the application of these and other cases to the right of Mr. Tator to recover compensation in California, it is important to note that the Supreme Court of Massachusetts has decided that in the administration of the Workmen's Compensation Law, the Industrial Accident Commission and the courts of that state are not bound by the acts of any other jurisdiction and that a proceeding brought in another state by an employee hired in Massachusetts "has no standing in law." *Migues' Case*, 281 Mass. 373, 183 N.E. 847, 848; *McLaughlin's Case*, 274 Mass. 217,

174 N.E. 338. In each of these cases an award made in Massachusetts in favor of an employee was sustained notwithstanding the fact that compensation had also been allowed in another state, although the employer was allowed credit for the amount previously awarded. In the *Clapper Case* it was stated that if the action for damages in New Hampshire could be maintained, the plaintiff might get a recovery which would be denied him by the law of Vermont; this also has some bearing upon Mr. Tator's application. Although the proceeding brought by him in California sought an award under the Compensation Law and is not an action for damages, the scale of compensation benefits is not the same in all states. If the employee may disregard the law of the state of his residence and employment and assert his rights in another jurisdiction, an employer may be required to pay compensation in an amount different from that for which he would be liable under the *lex loci*.

[1] Upon the principles which have been stated and applied in these cases, Mr. Tator cannot recover compensation in California unless this state has a governmental interest in the controversy superior to that of Massachusetts. At the time of his injury, Mr. Tator was a resident of Massachusetts. He was employed there, and was subject to the direction of officers of the employer there located. His salary was paid to him in that state, and he had come to California only on a specific errand for his employer. Under these circumstances the interest of California, like that of New Hampshire in the *Clapper Case*, *supra*, is only "casual," unless there are other facts upon which a governmental interest may be based. It is urged that this interest may be found in the medical and hospital expenses which were incurred in this state and had not been paid at the time of the hearing.

The modern view that the cost of industrial injuries is properly a part of the expense of production underlies all workmen's compensation laws. *Western Ind. Co. v. Pillsbury*, 170 Cal. 686, 151 P. 398. The public has a direct interest in the results of industrial accident. When the injured employee had only a right of action for damages, he too often became an object of charity. Even under present laws the public bears some part of the expense of such accidents in addition to the amount which is added to the cost of manufacture. The public, therefore, is vitally concerned

to see that adequate medical care is furnished to those injured. Indeed, the constitutional amendment adopted in 1918 which vested the Legislature with plenary power to create and enforce a complete system of workmen's compensation defines such a system as including "full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury." Art. 20, § 21. The Workmen's Compensation Law uses this same language in prescribing the medical and hospital treatment which an employer must furnish. Section 9(a), amended by St.1929, p. 1420. Even before these enactments this court recognized the important place medical care has in the administration of workmen's compensation when it said: "Compensation means more than a mere cash payment to an individual. Compensation to employes for injuries incurred by them may fairly be said to mean, not only a money payment to the employe himself, but provision or indemnification for the various elements of loss which may be the direct result of his injury. It includes, for example, the obligation to provide medical and surgical treatment (sec. 15, subd. a)—an obligation which does not necessarily involve payment in cash to the employe himself." *Western Metals Supply Co. v. Pillsbury*, 172 Cal. 407, 156 P. 491, 494, Ann. Cas.1917E, 390.

[2,3] An award for medical expense cannot be made in favor of a physician in a proceeding to which the injured employee is not a party, *Pacific Employers' Insurance Co. v. French*, 212 Cal. 139, 298 P. 23, but a physician who has rendered medical aid to a compensable employee may maintain an application to recover the value of his services in a proceeding in which both the employer and employee are named as defendants. Such a physician is a party in interest because an effective administration of the Workmen's Compensation Act both assures and requires adequate medical care and treatment. This court has said: "As a practical matter, injured employees as a class will receive better and more willing medical service if remuneration for such services from an employer or insurance carrier is assured to doctors and hospitals than if instances may arise in which, if an employee neglects to file a claim for compensation, after the services have been rendered, such doctors and hospitals may be required to look only to the injured employee for compensation. It

should be borne in mind that the medical, surgical, and hospital treatment which is intended to be assured to injured employees as one of the items of their compensation by the act, will be more certain to be furnished if doctors and hospitals are assured of certain remuneration for their services." *Independence Indem. Co. v. Indus. Acc. Comm.*, 2 Cal.2d 397, 404, 41 P.2d 320, 323.

The public policy of California upon this question has been clearly and positively stated in the Constitution, the Workmen's Compensation Law which was enacted pursuant to it, and the decisions of this court. It would be obnoxious to that policy to deny persons who have been injured in this state the right to apply for compensation when to do so might require physicians and hospitals to go to another state to collect charges for medical care and treatment given to such persons. Under these circumstances, the governmental policy of California weighs more heavily in the scale of decision than the law of Massachusetts, and the conflict in laws must be resolved in favor of the state where the injury occurred.

The award is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; LANDON, J.

I concur in the judgment: HOUSER, J.



10 Cal.2d 519
BROWN v. REGAN et al.

L. A. 16409.

Supreme Court of California.

Jan. 31, 1938.

1. Trial ↪339(1)

The proper procedure where an informal or insufficient verdict has been returned is for the trial court to require the jury to return for further deliberation.

2. Trial ↪345

Where a verdict is not in proper form and the jury is not required to clarify it, any error in verdict is waived by party relying thereon who at time of its rendition

failed to make any request that its informality or uncertainty be corrected.

3. Trial ☞339(1)

The trial court retains entire control of proceedings up to time jury is finally discharged from further consideration of case, and it is trial court's duty to require jury to clarify an uncertain verdict.

4. Appeal and error ☞882(17)

In pedestrian's action for injuries sustained when struck by automobile driven by minor son of owner with owner's permission, defect in verdict finding for pedestrian and against son in sum of "nothing dollars" and against owner in the sum of \$5,000 was waived, where owner's attorney did not seek to have jury returned for further deliberation but vigorously opposed efforts of pedestrian's attorney to secure clarification of verdict and the owner was estopped on appeal from relying on the defect in verdict. St.1935, p. 153, § 402.

5. Automobiles ☞245(72)

A pedestrian who was struck by automobile while crossing street between intersections at which traffic control signals were placed, but who was not crossing in crosswalk, was not contributorily negligent as matter of law, in absence of evidence that control signals were in operation at time of accident. St.1935, p. 188, § 563.

6. Automobiles ☞217(3)

An intersection is not "controlled" within statute prohibiting pedestrians from crossing street at any place except at crosswalk between adjacent intersections controlled by traffic control signals when signals at the intersection are not in actual operation. St.1935, p. 188, § 563.

7. Automobiles ☞244(50)

In pedestrian's action for injuries sustained when struck by automobile while crossing street between intersections at which traffic control signals were placed, but which were not shown to have been in operation at time of accident, evidence that pedestrian stopped to let automobile go by, but that automobile swerved toward pedestrian and struck him, justified jury's finding that pedestrian was not guilty of contributory negligence. St.1935, p. 188, § 563.

8. Appeal and error ☞907(4)

An appellate court may assume that evidence not set forth in record justifies findings.

In Bank.

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by Lansing Brown against William Regan and F. F. Regan for injuries sustained when struck by an automobile. From an adverse judgment, F. F. Regan appeals.

Affirmed.

Prior Opinion, 68 P.2d 307.

W. I. Gilbert, of Los Angeles, for appellants.

Sidney A. Moss, of Los Angeles (Henry H. Childress, of San Francisco, of counsel), for respondent.

CURTIS, Justice.

Plaintiff recovered judgment against the defendant F. F. Regan in the sum of \$5,000 for injuries sustained by him when struck by an automobile. At or about 1:45 a. m. on June 29, 1935, the plaintiff, a pedestrian, was in the act of crossing Western avenue between Sixth street and Wilshire boulevard, in the city of Los Angeles, when he was struck by a car owned by defendant F. F. Regan and driven by his son, Wm. Regan. Plaintiff suffered serious injuries, and to recover damages therefor brought this action, naming as defendants both Wm. Regan, the operator of the automobile, and F. F. Regan, the owner. Defendants denied the allegations of negligence pleaded in the complaint, and set up as a defense contributory negligence on the part of the plaintiff. The jury brought in a verdict in the following words: "We the jury in the above entitled action, find for the plaintiff, Lansing Brown, and against defendant, Wm. Regan, and fix the damages in the sum of Nothing Dollars (\$—) and against the defendant, F. F. Regan, the father, in the sum of \$5,000 (\$—). This 7th day of October, 1936. G. W. Adams, Foreman." The court denied the motion of F. F. Regan for a judgment in his favor notwithstanding the verdict, and entered judgment that plaintiff recover from F. F. Regan the sum of \$5,000, and from defendant Wm. Regan "nothing dollars." From said judgment F. F. Regan appeals.

Appellant contends that the verdict should be set aside and the judgment reversed upon the grounds, first, that the amount of appellant's liability to plaintiff could not exceed that of his codefendant, which was expressly found by the jury to be "nothing dollars," and, second, that the

evidence establishes as a matter of law that the respondent was guilty of contributory negligence.

Appellant strongly relies upon the cases of *Bradford v. Brock*, 140 Cal.App. 47, 34 P.2d 1048, and *Kerrison v. Unger*, 135 Cal. App. 607, 27 P.2d 927, as establishing the rule that the liability of the owner of an automobile arising out of section 1714 $\frac{1}{4}$ of the Civil Code, now section 402 of the Vehicle Code, St.1935, p. 153, is identical with that of the operator of the automobile, and that, where a verdict is returned against the operator of an automobile for a sum less than \$5,000 for injuries to one person, under said section of the Code the verdict of the jury against the owner of the automobile must be in the same sum as against the operator. Respondent relies upon the cases of *Broome v. Kern Valley Packing Co.*, 6 Cal.App.2d 256, 44 P.2d 430; *Bosse v. Marye*, 80 Cal.App. 109, 250 P. 693, as establishing the rule that the liability of the owner of an automobile is a direct and primary liability toward the person injured by the negligent operation of such automobile by another driving with the owner's permission, and recovery is not dependent upon a recovery being had against the codefendant of the owner. These cases establish the rule that, where the liability of one defendant is predicated upon the active negligence or fault of another defendant, and the verdict is silent as to one of the defendants, the effect is that there has been merely a failure to find on one of the issues, and a verdict and judgment against the other defendant is not thereby voided. Both parties agree that the instant case does not present the situation where a verdict expressly exonerating a defendant charged with active negligence or fault automatically precludes any judgment against his codefendant, and that neither is it a case where the verdict is silent as to the operator of the car charged with active negligence. In view of the verdict, "in favor of the plaintiff Lansing Brown, and against defendant, Wm. Regan," it is obvious that this is so. This portion of the verdict could mean only one thing, that the jury found the defendant operator, Wm. Regan, guilty of negligence in the operation of the car and the plaintiff free from contributory negligence. Appellant further concedes that plaintiff did receive serious injuries as the result of the accident. In fact, appellant relies upon the established fact that plaintiff did receive severe injuries as the underlying premise

for one of his arguments for a reversal of the judgment against him. Thus in his closing brief appellant expressly states: "Respondent established without dispute that as a result of the accident, he had incurred hospitalization, nurses' and doctor's bills and medical expenses, amounting to the sum of \$4,932.65." This conceded amount is only \$67.35 less than the verdict of \$5,000 found by the jury against F. F. Regan. Furthermore, no attempt was made to contradict or minimize the testimony of the physician attending plaintiff to the effect that plaintiff's injuries consisted of a fracture of the tibia and fibula, a traverse fracture of the right humerus, and a compression type fracture of the third, fourth, and fifth dorsal vertebræ, and fractures of the traverse processes of the second, third, fourth, and fifth lumbar vertebræ, and that at the time of the trial a further operation upon plaintiff's leg was imperative.

Appellant's argument, therefore, reduces itself to this proposition. Despite the fact that the jury expressly found against the defendant operator and thereby found him responsible for the accident and guilty of the negligence charged in the complaint, and despite the admitted fact that plaintiff was seriously injured and his hospitalization expenses alone amounted to approximately the sum of \$5,000, the amount of the verdict against the appellant, nevertheless because the jury through error fixed the damages against the operator of the automobile as "nothing dollars," the verdict against the appellant for \$5,000 must be set aside and the judgment reversed.

[1-4] We may concede that there was error in the form of the verdict, but we are of the opinion that appellant is in no position to rely upon the error. It is obvious from the verdict, considered in conjunction with the record, that the jury was laboring under the mistaken idea that the liability imposed upon the owner of an automobile by section 1714 $\frac{1}{4}$ of the Civil Code (now section 402 of the Vehicle Code), under the theory of imputed negligence, was a liability substituted for the liability of the operator, and that the jury by said verdict was attempting to pass on to the owner of the automobile the liability of the operator of the automobile. The proper procedure where an informal or insufficient verdict has been returned is for the trial court to require the jury to return for further deliberation. *Kerrison v. Unger*, 135 Cal.App. 607, 611, 27 P.2d 927. There can be no doubt, in view of the

record presented on appeal, that, had the jury been required by the trial court to retire for further deliberation under proper instructions, a proper verdict would have been returned. It is well established by numerous authorities that, when a verdict is not in proper form and the jury is not required to clarify it, any error in said verdict is waived by the party relying thereon who at the time of its rendition failed to make any request that its informality or uncertainty be corrected. *Benson v. Southern Pacific Co.*, 177 Cal. 777, 171 P. 948; *Ambrose v. Allen*, 113 Cal.App. 107, 298 P. 169; *Harker v. Southern California Edison Co.*, 83 Cal. App. 204, 256 P. 848; *Mitchell v. Stringer*, 133 Cal.App. 207, 23 P.2d 765; *Joerger v. Pacific Gas & Electric Company*, 207 Cal. 8, 21, 276 P. 1017; *Van Damme v. McGilvray Stone Co.*, 22 Cal.App. 191, 133 P. 995. An examination of the proceedings which took place upon the returning of the verdict demonstrates that the attorney for appellant not only did not seek to have the jury returned for further deliberation in an effort to clear up the apparent ambiguity, but vigorously opposed the efforts of the attorney for the plaintiff to secure such clarification of the verdict. So vigorously did he urge his objection that the trial court was without power to require the jury to return for further deliberations, that the trial court acceded to his position, and ordered the clerk to file the verdict as rendered. His objection was wholly without merit, as the trial court retained entire control of the proceedings up to the time the jury was finally discharged from further consideration of the case, and it was not only within the power of the trial court to require the jury to clarify its verdict, but it was his duty to do so. *Van Damme v. McGilvray Stone Co.*, 22 Cal.App. 191, 194, 133 P. 995. If mere inaction alone will constitute a waiver of a defect in a verdict, it is self-evident that the conduct of appellant's attorney in actively opposing the efforts of the attorney for the respondent to have the defect cured will constitute a waiver. In the *Van Damme* Case is to be found language which we deem to be appropriate to the action of the appellant in the instant case. In that case, the attorney relying on the alleged error in the verdict of the jury, which had returned a general verdict for the plaintiff, but declined to answer a special interrogatory, replied when the court offered to send the jury back if counsel desired, "the record shows they have declined to find upon it."

The appellate court held that the defendant, having failed at the opportune time to object to the acceptance and recollection of the verdict, could not be heard to complain, saying: "On the face of the record, argument seems superfluous. It creates an abiding conviction that the matter was permitted to stand as originally returned by the jury with a view of thereafter reaping any technical advantage that might result by reason of the situation." We think there is no question that attorney for appellant waived the defect in the verdict, and is estopped to rely upon such defect in the verdict upon this appeal.

[5, 6] We cannot agree with appellant's second contention that the evidence establishes that the respondent was guilty of contributory negligence as a matter of law. Appellant cites the fact that plaintiff was not crossing Western avenue between Sixth street and Wilshire boulevard at a crosswalk, and the stipulated fact that traffic control signals were prominently located on the north and south sides of the block in which the accident occurred, and claims that the plaintiff by not crossing at a crosswalk violated section 131½(d) of the California Vehicle Act, St.1923, p. 517, as added by St.1931, p. 2127, now section 563 of the Vehicle Code, St.1935, p. 188, and was therefore guilty of contributory negligence as a matter of law. Said section reads as follows: "At intersections where traffic is controlled by traffic control signals, or by police officers, pedestrians shall not cross the roadway against a red or stop signal, and between adjacent intersections so controlled shall not cross at any place, except in a marked or unmarked crosswalk." Appellant interprets said section as holding that the mere erection of traffic control signals at any given intersection requires pedestrians to cross only at crosswalks. The language of said section does not support this contention. It makes it a violation of the act to cross against a red signal "where traffic is controlled by traffic control signals," and unlawful to cross except at a crosswalk "between adjacent intersections so controlled." An intersection is not controlled within the meaning of this section when signals at the intersection are not in actual operation. The time of the accident was about 1:45 a. m. There is no evidence that the signals at the adjacent intersections were in operation at the time of the accident.

[7,8] Respondent's version of the accident was that, as he was crossing Western avenue, he saw the Regan car coming toward him on the proper side of the street; that, as the car approached him, he stopped to let it go by, but that at that time it swerved toward him and struck him. If this version of the accident was accepted by the jury as true, as evidently it was, the jury was justified in finding that respondent was not guilty of contributory negligence. In stopping to let the car go by, he yielded the right of way to the car. The deposition of Thomas Jurekovic, an eyewitness to the accident, was offered and read in evidence on behalf of the respondent. This evidence was not included in the transcript on appeal. It is the rule that it may be assumed by an appellate court that evidence not set forth in the record justifies the findings. *E. C. Horst Co. v. New Blue Point Min. Co.*, 177 Cal. 631, 171 P. 417; *Emerick v. Johnson*, 64 Cal.App. 460, 221 P. 675.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; EDMONDS, J.; LANGDON, J.; HOUSER, J.; SHENK, J.



10 Cal.2d 501

PEOPLE v. GANAHL LUMBER CO.

L. A. 16397.

Supreme Court of California.

Jan. 28, 1938.

Rehearing Denied Feb. 24, 1938.

1. Railroads ⇐73(4)

A lease from railroad for erection of lumber yard, providing for term of one year and month-to-month tenancy thereafter, and contemporaneous contract whereby railroad agreed to construct spur to lumber yard at cost of \$2,600, to be borne by lessee, and to rebate \$1,016.21 by semiannual payments at \$2 per carload of freight shipped over spur, would be construed together in determining term of lease. *Civ.Code*, § 1642.

2. Evidence ⇐450(4,7)

A lease from railroad for erection of lumber yard, providing for term of one year and month-to-month tenancy thereafter, and

contemporaneous contract whereby railroad agreed to construct spur to lumber yard at cost of \$2,600, to be borne by lessee, and to rebate \$1,016.21 by semiannual payments at \$2 per carload of freight shipped over spur, were sufficiently ambiguous to authorize admission of parol evidence as to term of lease.

3. Evidence ⇐448

Where document contains inconsistent provisions, extrinsic evidence may be resorted to to determine intention of parties.

4. Eminent domain ⇐205

In condemnation action against lessee, evidence as to whether lessor, a railroad, assured lessee orally that lease, which provided for term of one year and month-to-month tenancy thereafter, would continue until \$1,016.21 of \$2,600, the cost to lessee of spur constructed by railroad to lessee's lumber yard on leased premises, was repaid by semiannual payments at \$2 per carload of freight shipped over spur, authorized recovery based on lease term of 22 years and 11 months, which would be necessary to repay \$1,016.21 at prior average rebate per year.

5. Eminent domain ⇐155

Under lease from railroad for erection of lumber yard, providing for term of one year and month-to-month tenancy thereafter, and contemporaneous contract whereby railroad agreed to construct spur to lumber yard at cost of \$2,600, to be borne by lessee, and to rebate \$1,016.21 by semiannual payments at \$2 per carload of freight shipped over spur, where railroad attempted to terminate lease before making full rebate, and state took possession of portion of leased premises by condemnation, lessee did not, by accepting new lease of that part of premises which was not condemned and of adjacent property, consent to termination of lease so as to bar recovery from state for value of use of condemned property during remainder of term necessary to make full rebate.

6. Eminent domain ⇐155

In condemnation action against lessee, lessee was entitled to recover for damage to its leasehold interest, with improvements and fixtures which it had made thereon and affixed thereto.

7. Eminent domain ⇐150

\$25,092 to lessee for condemnation, for highway purposes, of strip of land used by lessee for lumber yard, was not excessive, where lessee had unexpired term of 22 years

and 11 months, had made valuable improvements, had paid \$2,600 to lessor, a railroad, for installation of spur to lumber yard under contract whereby railroad agreed to rebate \$2 per carload of freight shipped over spur until lessee received rebate of \$1,016.21, and had received \$278 through rebates.

In Bank.

Appeal from Superior Court, Santa Barbara County.

Condemnation action by the People, acting by and through the Department of Public Works, against Ganahl Lumber Company. From a judgment for defendant, plaintiff appeals.

Affirmed.

For prior opinion, see 67 P.2d 712.

Clarence W. Morris, Lincoln V. Johnson, George C. Hadley, and Clifford D. Good, all of San Francisco, for the People.

Schauer, Ryon & McMahon, of Santa Barbara, Thomas F. Murphine, of Los Angeles, and Robert W. McIntyre, of Santa Barbara, for respondent.

CURTIS, Justice.

This action is one in condemnation instituted by the People of the State of California to condemn for highway purposes a strip of land situated in the city of Santa Barbara. The title to the land was at the commencement of the action, and for some years prior thereto had been, in the Southern Pacific Company. Said land is located adjacent to the right of way of said company. During the early part of the year 1925, the defendant Ganahl Lumber Company began negotiations with the Southern Pacific for a site in the city of Santa Barbara upon which to establish a lumber yard for the sale at retail of lumber and other building materials. As a result of these negotiations a lease was entered into by the Southern Pacific Company and the defendant, the Ganahl Lumber Company, for all that portion of lot 538 of the city of Santa Barbara lying northerly of the right of way of said railroad company. The Southern Pacific Company further entered into an agreement to construct a spur track connecting its main line of tracks with the property leased by it to the lumber company. These two instruments while bearing different dates were delivered simultaneously by the railroad company to the lumber company. The date of

such delivery was February 15, 1926. The written lease provided that the term of said lease would be for a term of one year from December 1, 1925, and thereafter, if the lumber company continued to hold over, it did so under a month-to-month tenancy. The rental was \$50 per month. Under the terms of the spur track agreement the railroad company was to construct a spur track at the expense of the lumber company and at a cost of \$2,600. However, a concession was made to the lumber company in the sum of \$1,016.21 on the cost of this spur track to be repaid the lumber company by a rebate of \$2 for each carload of freight shipped over said spur track until said sum of \$1,016.21 had been paid. It will be seen that some time elapsed between the commencement of said negotiations and the final consummation thereof by the delivery of said lease and spur track agreement. This delay was not occasioned by the fault of either party to said lease, but principally by reason of certain zoning restrictions, which until removed prevented the use of said leased premises for business purposes. Upon the delivery of said two instruments, the railroad company constructed said spur track, and the defendant lumber company entered upon said leased premises and erected thereon a planing mill and a retail lumber and building supply plant, together with equipment and fixtures necessary to operate said mill and plant. These buildings and improvements were erected at a cost of approximately \$40,000 and upon their completion were used by defendant in operating said planing mill and carrying on a retail lumber business. The premises were so used when this action in condemnation was instituted. On January 22, 1934, the Southern Pacific Company served notice upon defendant of the termination of said lease; the effective termination of said lease according to said notice was February 28, 1934. In April following, this action was commenced to condemn for highway purposes a portion of said leased premises, and on June 6, 1934, the state highway commission took actual possession of that portion of said leased premises which the plaintiff sought by this action to condemn, and commenced the construction of a state highway thereon. On June 8, 1934, the defendant lumber company and the Southern Pacific Company entered into a new lease whereby the Southern Pacific Company leased to defendant, for the monthly rental of \$50 per month, that portion of said leased premises not sought to be condemned together with adjoining land in

an adjacent block, the effective date of said new lease being June 1, 1934. The other terms of said new lease were substantially like those contained in the first lease. The buildings and improvements upon that portion of the leased premises sought to be condemned were removed therefrom onto the newly leased premises. The spur track agreement was not in any way affected by this change in location of defendant's mill and plant, but by a supplemental agreement defendant continued to use said spur track in the operation of its business after said change as it had used it before, and the same rebate of \$2 per car was allowed to defendant for each carload of freight shipped over said spur track. The case came on for trial before the court without a jury, and resulted in a judgment for damages in favor of the defendant lumber company in the sum of \$25,092 besides interest. From this judgment the plaintiff has appealed.

During the progress of the trial the court, over the objection of appellant, admitted in evidence certain conversation and correspondence between the respondent and officers and representatives of the Southern Pacific Company during the negotiations between these parties for said lease and spur track agreement, and prior to the delivery of said lease and agreement as hereinabove stated. This evidence was admitted on the theory that the lease and spur track agreement were in fact but one instrument and should be considered and construed together, and if so construed, the contract between the parties thereto was uncertain and ambiguous in respect to the length of the term of said lease contract. While the written lease provided that the term should be one year, and thereafter in event the lessee held over it would be under a month to month tenancy, the spur track agreement provided that the lessee should be allowed a rebate of \$2 per car for all freight shipped over said spur track until the sum of \$1,016.21 was paid. The evidence admitted over said objection of the appellant revealed the fact that this discrepancy in the two instruments had been the subject of much discussion between the parties to said instruments pending the negotiations for said lease. In one such conversation held between Mr. Ganahl, the president of the respondent, and a representative of the railroad company, Mr. Ganahl referred to the provision in the written lease limiting the term thereof to one year and thereafter to a month-to-month tenancy, and stated that such an arrangement would not serve the purpose of a per-

manent lease. Thereupon the representative of the railroad company replied that the railroad company had the printed form and all leases must be made on this printed form, but as the respondent was to be allowed a rebate on the cost of a portion of the spur track for each carload of freight shipped over said spur track, said representative asked how many cars the respondent would receive over the spur track. After some consultation between the parties, it was estimated that the number would be fifteen a year. The representative of the railroad company then said, "Figure it out at 15 cars a year and on the basis of \$1,100 refund to you, it would take 35 years before you would get your refund back," and he then added, "As long as you haven't earned your refund, the Southern Pacific will never cancel your lease unless they need it for railroad purposes or you don't pay your rent or don't comply with the laws and city ordinances relative to such property." Other and similar conversations were had between the president of respondent and representatives of the railroad and in each of them similar assurances were given respondent that the railroad company would not cancel the lease until the spur track agreement was "worn out." In letters passing from officials of the railroad company to the respondent during these negotiations, references are made to respondent's "permanent lease" or to its "permanent location." This evidence if properly admitted tended to show that it was the intention of the parties to said lease and spur track agreement that respondent's lease of said premises was to extend to the full limit of time required for the payment of said sum of \$1,016.21. From this and other evidence, the trial court fixed the unexpired term at the date of the commencement of this action at 22 years and 11 months, and found that the respondent was the owner of said leasehold interest for said term of years and upon such finding gave judgment in the amount hereinbefore stated.

Appellant now makes the contention that the court erred in finding that the notice of termination of said lease was ineffective and of no force and effect whatever and that at the commencement of this action the respondent was the owner of a leasehold interest in the land sought to be condemned having an unexpired term of 22 years and 11 months. This contention is predicated upon the assumption that the written lease of the parties provided after the first year of its term only for a month-to-month tenan-

cy and that this tenancy was terminated by the written notice given respondent by the railroad company on January 22, 1934. This contention brings up for consideration and answer the following questions: (1) Was the written lease the sole contract of the parties respecting the term for which said premises were leased, or should said written lease and the spur track agreement be construed together in determining the term of said lease? (2) If these two instruments are to be construed together in order to determine the intention of the parties as to the length of said term, are they, as so construed, so uncertain and ambiguous as to permit the admission of parol evidence to explain their true meaning? (3) If they are so uncertain and ambiguous as to admit of parol evidence, was the evidence so admitted, together with the terms of said instruments themselves, sufficient to support the findings of the trial court that the attempted termination by the lessor of said lease was of no force and effect, and that the lessee at the commencement of said action was the owner of a leasehold interest having an unexpired term, which the court found to be 22 years and 11 months in length?

[1] In answering the first of these three questions, we think that an examination of the two instruments, the lease and the spur track agreement, can leave little doubt that they not only relate to the same matter but that the one is necessary to explain the other. In the first place they are between the same parties, and while dated at different times, they were delivered at the same time. They each refer to and concern the same subject-matter, to wit, the occupancy and use of the property of the lessor by the lessee. The value of the lease would be greatly impaired without the agreement and the agreement for the spur track would be utterly valueless to the respondent without the lease. Neither would in all probability have been executed without the other. Taken together, they contain the complete agreement and understanding of the parties. The two instruments were executed for the purpose of achieving a single purpose. "Where two or more written instruments are executed contemporaneously, with reference to each other, for the purpose of attaining a preconceived object, they must all be construed together and effect given, if possible, to the purpose intended to be accomplished." *Burnett v. Piercy*, 149 Cal. 178, 189, 86 P. 603, 607, citing *Civ.*

Code, § 1642; 13 *Cyc.* p. 603; *Devlin on Deeds*, § 845. See, also, *Galt v. Murphy*, 86 Cal.App. 516, 261 P. 751; 6 Cal.Jur. 298. From the facts as stated above and from the cited authorities, we are of the opinion that in order to ascertain the true intent of the parties to said transaction respecting the term for which the property was leased, it was proper, and in fact necessary, to consider both of said instruments, and in arriving at said intent, said lease and spur track agreement should be considered together as one instrument.

[2, 3] Construing the two instruments together, as in our opinion it is our duty so to do, we find that in the lease proper the term thereof is fixed at one year, and in case of holding over after said year, a month-to-month tenancy is created, while under the spur track agreement, after providing that the \$2 per carload rebate shall be paid by the railroad company semiannually, the agreement further expressly states "said semi-annual payments shall continue until a sufficient number of cars at said two (\$2.00) dollars for each carload of freight yielding road haul revenue to railroad and delivered on or shipped from said track for undersigned (respondent lumber company) or any other industry locating adjacent to said track, shall equal the cost of the portion of said track from the point of the initial switch thereof to the clearance point in the center line thereof." It is agreed by both parties hereto that the cost of that portion of said track was the sum of \$1,016.21. Here we have the lease providing for a month-to-month tenancy, after the first year, while the spur track agreement provides for the construction of a spur track to be used in connection with the leased premises at the cost of respondent as to a portion of said track, with an agreement on the part of the railroad company to repay to the lumber company said cost in semiannual payments, which "semiannual payments shall continue until a sufficient number of cars at said two dollars per car" shall equal the cost of the portion of the track for which respondent was to be reimbursed. These two statements are at utter variance with each other, and produce an ambiguity which justified the trial court in admitting evidence to explain the real meaning and intention of the parties in the execution of the two instruments. The rule is well settled that where a document contains conflicting and inconsistent provisions, extrinsic evidence may be resorted to in

order to determine the intention of the parties. *Balfour v. Fresno Canal & Irrigation Company*, 109 Cal. 221, 225, 41 P. 876; *Lemm v. Stillwater Land & Cattle Co.*, 217 Cal. 474, 481, 19 P.2d 785; *Gallatin v. Markowitz*, 139 Cal.App. 10, 13, 33 P.2d 424; *Kenney v. Los Feliz Investment Company, Ltd.*, 121 Cal.App. 378, 386, 9 P.2d 225; *Raisch v. County of Monterey*, 140 Cal.App. 627, 634, 35 P.2d 587. The rule is well stated in the case of *Balfour v. Fresno Canal & Irrigation Company*, supra, 109 Cal. 221, at page 225, 41 P. 876, 877, as follows: "If the language of the contract is, as defendant contends, plain and unambiguous, and susceptible of but one construction, then the objection was good, and the evidence properly excluded. If, however, the language employed be fairly susceptible of either one of the two interpretations contended for, without doing violence to its usual and ordinary import, or some established rule of construction, then an ambiguity arises, which extrinsic evidence may be resorted to for the purpose of explaining. This is not allowing parol evidence for the purpose of varying or altering the contract, or of putting a different sense and construction upon its language from that which it would naturally bear, but for the purpose of showing the circumstances under which the language was used, and applying it according to the intention of the parties."

[4] We now pass to the consideration of the evidence, both the extrinsic evidence admitted to explain the ambiguity in the lease and the spur track agreement, and these two written instruments themselves, to determine whether this evidence taken as a whole supports the finding of the trial court that the attempted termination of the lease was of no force or effect and that the lessee at the commencement of this action was the owner of a leasehold interest in said leased property for an unexpired term of 22 years and 11 months. If the lessee, the respondent herein, had only a month-to-month lease of said premises at the time the notice of termination was served upon it, then said notice was effective to terminate said lease; but if the term of said lease was controlled by the other considerations mentioned above, then the notice and the service thereof was ineffective for any purpose. The oral evidence which has already been referred to shows without any conflict that the representatives of the lessor, the Southern Pacific Company, and the president of

the respondent company, gave this matter their special attention, and said representatives of the railroad company expressly assured Mr. Ganahl, the president of respondent company, that as long as the lumber company had any unearned refund, the railroad company would never cancel the lease, or, as expressed on a different occasion, the railroad company would never cancel the lease until the spur track was "worn out." This evidence, in our opinion, fully supports the finding of the trial court that the lease of said premises was more than a month-to-month tenancy at the time of the service of said notice, and accordingly the notice was ineffective for any purpose. At that time the rebates under the spur track agreement amounted to only \$278, leaving a balance of \$738.21. The court took the average rebate per year, and divided the sum of \$738.21, by the amount of this average yearly rebate for the purpose of determining the length of time it would take to repay the full amount of said refund. The time thus ascertained was fixed as the length of the unexpired term of said lease which amounted to 22 years and 11 months. No question is raised by the appellant as to the correctness of this computation. It is conceded that if the computation is based upon the proper premise, the result is correct. In our opinion the court adopted the correct premise in thus fixing the terms of said lease, and its finding as to the length of the unexpired term of said lease and respondent's ownership of said leasehold interest finds full support in the evidence.

[5] Appellant next contends that the respondent by entering into the new lease with the lessor consented to the termination of the old lease. The new lease was not executed until long after the commencement of this action and after the state highway commission had taken possession of the portion of the leased land sought to be condemned. Respondent was then in the position in which it either had to retire from business or seek a new location in which it could carry on. The fact that it leased land for its new location from the same company from which it had leased the premises covered by the old lease, had no bearing, as far as we can see, upon its old lease, or upon the amount in which it was damaged by being deprived of its leasehold rights by appellant.

[6] Appellant finally contends that the amount of damages was arrived at in a

manner which was neither proper nor legal, and that said damages are excessive. Neither of these contentions has any substantial merit. For some purpose not entirely clear to us, appellant relies upon and claims that the trial court refused to follow the case of *City of Pasadena v. Porter*, 201 Cal. 381, 257 P. 526, 53 A.L.R. 679. In the *Porter* Case the landlord and tenant were made defendants in a condemnation action instituted by the city of Pasadena. The property sought to be condemned was business property owned by Porter, and leased to her tenant. Only a part of this property was the subject of said condemnation action. The judgment in condemnation, which was affirmed, provided that the value of the tenant's leasehold interest in the property condemned should be paid to the tenant, and the latter should continue to pay to the landlord the entire rent called for by the terms of the lease for the full terms of the lease. In that case, however, the tenant did not own the building or other improvements on said leased premises, and had no interest therein except to use the land and improvement under the terms of his lease. Accordingly, he received nothing for any improvement upon the land condemned. In the present action, as we have seen, the tenant has constructed valuable improvements, and they were in use by the tenant upon the land at the time the condemnation action was commenced. These improvements consisted of buildings and fixtures affixed to the land, and the damage sustained by the respondent was to its leasehold interest with the improvements and fixtures thereon. We fail to perceive how the rule announced in the *Porter* Case has in any way been violated by the judgment of the trial court in the present action.

[7] The findings of the trial court as to the amount of respondent's damage are amply supported by the evidence. Not only respondent's witnesses, but most of appellant's witnesses, when asked to fix respondent's damage under the assumption that its lease had some twenty-two years or more to run, named an amount equal to and in most instances in excess of, the amount fixed by the court. The contention that the amount of damages is excessive is without merit.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

CARTER v. MURPHY.

L. A. 16380.

Supreme Court of California.

Jan. 31, 1938.

Rehearing Denied Feb. 24, 1938.

1. Seduction ◀1

"Seduction," in its ordinary acceptance, implies a betrayal of confidence, but a married man may seduce a woman, even though she is aware of his marriage, and seduction cases need not be based on a violated promise of marriage, since under modern definition "seduction" is the act of persuading a woman to surrender her chastity.

[Ed. Note.—For other definitions of "Seduce; Seduction," see Words & Phrases.]

2. Seduction ◀1

The word "seduce" imports the idea of illicit sexual intercourse accomplished by arts, promises, or deception overcoming a female's reluctance and scruples.

3. Seduction ◀17

In seduction action by female under 18 years of age, evidence supported trial court's finding that 33 year old married defendant induced female to have illicit intercourse by enticements and persuasions overcoming her reluctance and scruples. Code Civ.Proc. § 374.

4. Seduction ◀5

That defendant committed rape if he had intercourse with female under 18 years of age would not exempt him from liability in action charging seduction, even though acts charged were perpetrated without regard to any of the means necessary to make out a case of seduction. Code Civ.Proc. § 374.

5. Seduction ◀22

In seduction action, finding that plaintiff was damaged in the sum of \$10,000 was not subject to exception that trial court, in computing damages, improperly included finding that defendant was wealthy and that finding was not supported by evidence, where only testimony relating to defendant's financial status was that he had asked plaintiff if she could live on \$250 a month, defendant testified that his salary of \$225 a month as a traveling salesman was his only source of income, and where findings were specifically based on general damages only.

6. Seduction ☞9

In seduction action on complaint alleging that first act of intercourse occurred in September, defendant could not avoid liability on ground that plaintiff was not chaste at that time because she testified that first act occurred in August, where defendant was the original violator of plaintiff's chastity in either event.

7. Appeal and error ☞1004(1)

In a seduction action, the jury's verdict will not be disturbed by court on ground of excessive damages unless verdict is so great as to raise suspicion of partiality, passion, prejudice, or corruption.

8. Appeal and error ☞1013

\$10,000 to female under 18 years of age for seduction by 33 year old married man was binding on Supreme Court where that amount was awarded by trial court sitting without a jury.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action for seduction by Mary Carter, by her guardian ad litem, Irene Brooks, against Jerry Murphy. From a judgment for plaintiff, defendant appeals.

Affirmed.

Prior opinion, 66 P.2d 1234.

Ezra Neff and Edwin C. Boehler, both of Los Angeles (Livingston & Livingston, of Los Angeles, of counsel), for appellant.

S. S. Hahn, W. O. Graf, and Stanton Rippey, all of Los Angeles, for respondent.

SEAWELL, Justice.

Mary Louise Carter, a minor under the age of eighteen years and not the wife of defendant, by an action prosecuted in the name of her guardian ad litem against defendant-appellant, Jerry Murphy, was awarded a judgment against him in the sum of \$10,000 by the superior court of the county of Los Angeles, sitting without a jury, on account of several alleged acts of seduction committed by him upon the body of said minor.

The complaint alleges four specific acts of sexual intercourse, committed in the city of Los Angeles, in the following order: On or about September 8, 1935; on or about September 15, 1935; on or about February 14, 1936; on or about April 8, 1936.

The defendant, without making any objection by demurrer or otherwise as to the sufficiency of the complaint or as to its infirmity in any particular, filed a verified answer in which he admitted the place of residence of the parties to the action and summarily disposed of all other allegations of the complaint by denying generally and specifically each and every allegation not otherwise expressly admitted or denied by his answer. Called as an adverse party (Code Civ.Proc. § 2055) he testified—contrary to the denials of his verified answer—to a number of acts of sexual intercourse committed with said plaintiff under guardianship, but was guarded as to any admission that would fix the times of intercourse prior to October 28, 1935, that being the day on which said Mary Carter arrived at the age of eighteen years. An admission on his part of the commission of any act of intercourse with Mary Carter prior to October 28, 1935, would have been an admission that he was guilty of the crime of rape. Pen.Code, § 261.

So much of the evidence is interwoven into our review of the sexual relations which existed between defendant and Mary Carter from the time he first met her to and including the month she became pregnant, to wit, April, 1936, and latterly the abortion committed to relieve her pregnancy, as we deem necessary to support the findings, and in turn, the judgment.

Defendant, a married man, thirty-three years of age, was a traveling salesman in the employ of the Standard Brands of California, a supply concern which had offices in the city of Los Angeles. At all times material to the action it is alleged that by employing and resorting to artful and deceptive methods, seductive blandishments and amorous and passionate appeals, the defendant accomplished his sexual desires.

Plaintiff, under guardianship, as shown by the birth certificate, was born at Glendale, county of Maricopa, state of Arizona, October 28, 1917. She resided with her parents near the town or city of her birth which, no doubt, was a rural community, where she attended school. During the summer vacations of the school she visited Mrs. Irene Brooks, a married sister, at Los Angeles, first in 1934, and again in 1935. Her sister was conducting a beauty parlor in said city and lived in an apartment. Mary Carter met the defendant on the occasion of her first visit with her sister, but nothing of an amorous char-

acter is mentioned in the evidence as to the defendant's conduct toward Mary on her first visit. Defendant and Irene Brooks seemed to have been on friendly terms to the extent that he commonly addressed her as Irene. In fact he signed as her surety on one occasion, in the sum of \$100 on the purchase of a sealskin coat. The obligation was afterwards discharged by her without financial loss to him. Mary's visits with her sister were during the summer vacation months, June, July, and August, 1934, 1935. It was her plan upon completing her visit in 1935 to return to her home and enter the Arizona State College to complete her educational course. During her stay in Los Angeles, Mary had rooms at her sister's apartment. By his admissions defendant frequently took Mrs. Irene Brooks and Mary to cafés for lunch and dinners and to places of entertainment. His attentions soon centered on Mary. Irene's business kept her occupied during the day and into the evenings. His method of contacting Mary was by phone calls at the sister's shop or at her apartment. He also called in person at her apartment during the sister's absence. His method of contact was suited to the exigencies of the situation. The first act of intercourse was accomplished by defendant at plaintiff's apartment in August, 1935, shortly prior to the time when Mary was about to return to her home in Arizona to resume her scholastic career.

[1-4] Mary's account of defendant's advances which led to the accomplishment of defendant's purpose is given in words and circumstances which bespeak remorseful consciousness caused by her deviation from the path of moral rectitude and the bitter humiliation which the shame of illegitimate pregnancy must bring to a young woman just emerging from girlhood into womanhood. There is not a word in the record that tends to show immoral propensities on the part of plaintiff under guardianship, or that she was unduly wayward, or was lacking in moral propriety or refinement, before she was beguiled by the blandishments of defendant. There is no reason to discredit the testimony of plaintiff to the effect that during her three months' vacation in Los Angeles the defendant insinuated himself into her affection by professions of love of her, and by fervid appeals that he "must have her and he could not do without her." Failing in his efforts to dissuade her from returning

to school, he requested her to spend her Christmas vacation at Los Angeles. He assured her that he would greatly miss her and asked her if he might write to her and visit her when and if he should go to Arizona, which he occasionally did. He had come to her apartment, he told her, to bid her goodbye. On the eve of departure she yielded to his amorous embrace. She testified that it was not without reluctance on her part, but she had come to love him and her resistance was so weakened by his professions that she was unable to withstand his amorous advances. This first act of intercourse was committed late in August and on the next day, Saturday, she left for her Arizona home. She did not re-enter school as her affections for him and the lustful passions aroused by her first act of intercourse impelled her to return to him about September 8th or 9th, after an absence of two weeks. Upon her return defendant called her by phone at her sister's shop and took her to lunch and after taking her on a ride in his automobile he took her to her sister's apartment and again had sexual intercourse. He took with him a bottle of liquor. Both took a drink or two or three at the apartment. He kissed her, made love to her and said he could not do without her. When she hesitated to readily submit herself to him, he said: "When people cared for each other it wasn't wrong."

The defendant upon his examination expressed himself as entertaining perverted notions as to the personal relations which, in cases of mutual love, might properly exist between the sexes. In mitigation of his conduct, and in line with his moral conception he said he had thought, and still thought a great deal of Mary, but her sister was trying to commercialize on something that was "decent." When asked to explain what he meant by "decent," his answer was that "as far as the way Mary Carter and I had sexual intercourse was just something that happens between people every day." He said she knew that he was married. He denied that he told her that he loved her. Mary testified that he told her that his wife was his senior in years and that he respected her but he did not love her; that defendant made no specific statement which she could recall that he would marry her, but he asked her if she could live on \$250 per month, and by his treatment and conduct he led her to believe that he loved her and intended to possess her as his wife and com-

panion. She believed his professions of love which she took to be sincere, and she became reciprocally enamored of him.

He had intercourse with her again on a date which she fixed as being about September 15th. The defendant came to her apartment at about 7 o'clock and again had intercourse with her. She drank no intoxicating liquor. Mrs. Ebba Holmberg, a draft clerk with the General Insurance Company of America, and a close friend of Irene Brooks, came to the Brooks' apartment at about 7:30 p. m., and rang the door bell but met with no response. She then went to the side bedroom window, called Mary and tapped on the window. Mary answered that she would open the door in a moment. Upon looking through the window she observed Mary rearranging her wearing apparel. Defendant was not fully attired as he went from the bedroom into the bathroom. Mary seemed confused by the unexpected call of her sister's friend. Her disordered appearance and defendant's presence made Miss Holmberg apprehensive as to the proprieties of the situation. Defendant's manner indicated that he was somewhat affected by the use of intoxicating liquor. This act of intercourse as testified to by plaintiff and corroborated by Miss Holmberg's testimony would be sufficient to convict the defendant of the crime of rape as plaintiff was then under eighteen years of age. The defendant denied that he had intercourse on the day named by said witnesses, but admitted acts of intercourse were committed a short time thereafter. Miss Holmberg did not mention what she had seen to the sister until she was afterwards told by Irene that Mary and the defendant had stayed together all night at a Los Angeles hotel.

Successive acts of intercourse on defendant's admissions took place at pseudo hotels, or at questionable hostleries, in which the occupants of rooms were not required to register. The defendant's duties as traveling salesman frequently took him into various cities and communities in southern California, and often a few days would pass when he did not meet plaintiff. Upon his return to the city he resumed his prior relations with her. At all times he knew that she was a school girl. When he first met her, she was not seventeen years of age. He testified that he never asked plaintiff her age but he had a recollection that she told him on her birthday, which was October 28, 1935, that

she had arrived at her eighteenth birthday. His course of illicit relations, according to his admission, began a few days after her birthday, about November 5th. From that day forward, he admitted that acts of sexual intercourse with plaintiff continued until interrupted by pregnancy which developed some time in April or May of the following year, 1936. When defendant was informed by Mary that a physician had pronounced her pregnant and that she had left her sister's apartment and was then stopping at a hotel, he told her that he would help "her to get out." He procured a prescription from a "friend," and brought to her a bottle containing liquid with written directions as to its internal use. This much is admitted by defendant. The plaintiff gave a more extended account of the defendant's active participation in the effort to relieve her of pregnancy. Briefly, she testified that when she called upon defendant and told him she was pregnant he asked her what the doctor had said. He assisted her in taking the medicine which he brought and told her that if it did not do the work she would have to try something else. Plaintiff, prior to this time, had procured a position with the telephone company. During three or four days after she had taken the medicine furnished her she was ill and unable to work. She then consulted a doctor and an operation was performed which relieved the pregnancy. The doctor who performed it was undoubtedly an abortionist as she did not see his face, which, in such cases, is usually masked or hidden from the patient by some means to prevent identification. Nurses are the usual mediums of visual contact. Plaintiff's health was impaired by the operation to the extent that she became unable to perform her duties.

The effort made by this defendant to excuse his course of salacious conduct with a school girl approximately one-half his age on the ground that he had on certain occasions voluntarily drank to an excessive degree presents a startling defense. He testified that on one or two occasions at least, after taking her to rooms for the purpose of having intercourse, he was not certain whether he had had intercourse or not, but upon being pressed for a definite answer he admitted that he did have intercourse. The evidence fully sustains the findings of the court that he was guilty of seduction. The only conclusion deducible from his testimony is that he did not love

plaintiff and he had no intention or expectation of setting aside his wife and ultimately marrying her, but that he deliberately planned by sedulous methods the undoing of an unsophisticated school girl in order to satisfy his carnal and lustful passions.

There can be no doubt that the defendant used every means and influence at his command to beguile plaintiff into the commission of the irremediable error which neither regrets nor sorrow can blot from her memory. Whatever the true relations may have been that existed between Mrs. Irene Brooks and defendant are not told by the record. But, if for purposes of example, it should be conceded that they were meretricious—both being married persons—the continuous secret meetings planned by the defendant with her youthful sister, who came in her school years from a respectable home, shows a lack of respect for the moral code which is indefensible. There is no evidence whatsoever that the sister encouraged, or had any knowledge of the existence of any immoral relations between her sister and defendant.

The testimony of Mary is clear and convincing, and in several particulars is corroborated by another witness, by unimpeachable circumstance and by the admissions of the defendant. She did not attempt to recite all of the terms of endearment employed by the defendant or describe the artful and subtle means by which the seducer may transport his youthful victim into a state of sexual excitation, whereby the will of the one is brought under subjugation of the other. Words are not adequate to describe the mental emotions and physical conduct of persons whose relations are such as shown by the record before us.

No attempt was made to show that plaintiff was a person of previous unchaste character. Defendant, during his examination, introduced into the case an episode to the effect that on one occasion he appeared at Mrs. Brooks apartment, at an unseemly hour, intoxicated, and because of his inebriated condition he was permitted to occupy a bed for the balance of the night. His testimony to the effect that he occupied a bed with both Mrs. Brooks and Mary and when he awoke later in the morning he found Mary in his bed but he was too far under the influence of liquor to know if he had had improper relations with her, is not persua-

sive, and doubtless it did not impress the trial judge. The fact that his meetings with plaintiff were clandestinely made and his intrigues were secretly arranged renders his statement improbable. Besides it was refuted.

As a further effort to impeach the previous chaste character of plaintiff, the following questions were put to her and answers given on cross-examination:

"Q. During part of this time, [referring to the period of illicit relations] as I understand it, you were working as a taxidancer in a dance hall on Fifth Street?"

A. One night.

"Q. One night? A. Yes, sir.

"Q. That is the only time you ever worked there? A. Yes, sir."

The subject was here dropped.

No act which tended in the slightest degree to reflect on plaintiff's character, prior to meeting the defendant, was hinted at during the trial. Both of the above incidents introduced into the case were subsequent to the time when plaintiff came under the influence and domination of the defendant, and, even if true, the defendant would not be permitted to take advantage of his own wrongful acts. In the instant case, the alleged particular immoral act which defendant seeks to turn to his advantage is but the continuance of the relations which were initiated by him in the circumstances herein set forth. The incident, if true, would serve well to emphasize the moral degeneracy and the far-reaching consequences of which the initial sexual act was the primal cause.

The action is prosecuted by virtue of the following provisions of section 374, Code of Civil Procedure of this state:

"§ 374. An unmarried female may prosecute, as plaintiff, an action for her own seduction, and may recover therein such damages, pecuniary or exemplary, as are assessed in her favor."

A jury having been expressly waived, the court awarded the plaintiff a judgment in the sum of \$10,000. The defendant has devoted the greater part of his argument to an effort to overthrow the judgment of the trial court holding him liable on the action for seduction. The acts offered to prove sexual intercourse, it is vigorously contended, even as detailed by the testimony of the plaintiff herself, giving due consideration to the inferences and deductions as are warranted by the facts proved

or as are warranted from a consideration of the propensities and passions of the defendant as disclosed by the evidence, sections 1958, 1960, Code of Civil Procedure, considered either singly or altogether, are not legally sufficient to constitute an action for seduction.

The case upon which appellant most strongly relies and to which frequent references are made and extended excerpts are taken is *Breon v. Henkle*, 14 Or. 494, 13 P. 289, 298. The Oregon Supreme Court then consisted of three members, Chief Justice Lord and Associate Justices Thayer and Strahan, Justice Thayer writing the opinion. Justice Strahan specially concurred in the order of reversal on the ground that certain instructions given at the request of respondent were correct as abstract propositions of law, but in the justice's opinion they had no application to any facts which the evidence tended to prove, and being mere abstract propositions of law were, in the facts of the case, misleading. Chief Justice Lord said in a general way, there were many things said in Justice Thayer's opinion (without specially designating any one) to which he assented, but inasmuch as the matter was before the court on a bill of exceptions and it was not stated therein that the bill of exceptions contained all the evidence, therefore under the long approved rule, it must be presumed that the instructions were warranted by the evidence, and no reversible error was committed by the court, since, of course, the instructions set forth a correct exposition of the law of seduction. Said action was prosecuted under section 35, Civil Code of the state of Oregon (Code Or.1930, § 1-309), which provides that an "unmarried female over twenty-one years of age may maintain an action as plaintiff for her own seduction, and recover therein such damages as may be assessed in her favor; but the prosecution of an action to judgment by the father, mother, or guardian, as presented in section 34, Civil Code [section 1-308], shall be a bar to an action by such unmarried female." It will be observed that the Oregon statute differs from our section 374, Code of Civil Procedure.

It was because of deference to the common-law rule, influenced by the particular phrasing of the statute, that the author of the opinion manifested a leaning to the common law which limited the recovery in cases of illicit sexual intercourse resulting in pregnancy to the actual pecuniary

loss sustained. In yielding to a construction of the statute which extended the ancient rule limiting the right of recovery to the loss of services sustained by parent or master, to include damages on account of mental anguish and loss of reputation and character suffered by the injured female, the author of the main opinion, undoubtedly incensed at the bold and iniquitous attempt of the plaintiff to convert pretended virtue into a thing of profit, entered into a lengthy disquisition on the subject of seduction both as to its legal and moral aspects in which neither of his two associates were willing to follow him the entire distance. One dissented and the third specially concurred. The divergent views of the court arose from the giving of an instruction held to be a correct general statement of the law of seduction but inapplicable to the case, there being no evidence to support certain assumed facts incorporated in the instruction. The assumption of said facts being deemed prejudicially misleading, it was held reversible error to give it. It reads:

"Seduction is the wrong of inducing a female to consent to unlawful intercourse by enticement and persuasions overcoming her reluctance and scruples. There must be reluctance on the woman's part to commit the act, and her consent must be obtained by flattery, false promises, artifice, urgent importunity based on professions of attachment, or the like. Otherwise there is no seduction in the proper sense of the word. Sexual intercourse accomplished by means of a promise of marriage is seduction. Therefore, if you shall find that the defendant did, through enticement or persuasion, or by artifice, urgent importunity based on profession of attachment, or by promise of marriage, or the like, overcome the plaintiff's reluctance and scruples, and thereby induced her to have unlawful intercourse with him, then you should find for the plaintiff, and assess her damages."

The authors of the main and concurring opinions were of the view that there was no evidence before the jury of any enticement, persuasion, artifice, or urgent importunity based on professions of attachment and therefore the court erred in charging the jury in an abstract manner that they had a right to consider any of the aforementioned propositions in determining whether defendant had committed seduction. The chief justice dissented from the order of reversal, the instructions in his view being a sound exposition of the law

and inasmuch as the bill of exceptions did not negative the assumption that no such evidence was adduced at the trial, and the law was correctly stated, error could not be presumed. It will require but brief references to the opinions in the case to make plain the wide factual differences which exist between the instant and the cited case. We have sufficiently described plaintiff's status in the instant case as a school girl of previous chaste character, under the age of eighteen years, and a resident of a neighboring state, who was visiting her sister at the time the seduction was committed.

The plaintiff in the Breon Case, upon which the defendant herein relies, was a woman twenty-eight years of age, had been twice married, and twice divorced, and was the mother of a child by each of her former husbands. The alleged seduction took place in plaintiff's room at the Palace Lodging house. She met the defendant some three months before he had intercourse with her. He called at her room on her invitation. Her narrative of what followed as summarized in the opinion is, that on the occasion in question, after some discussion he went out and brought in some beer. Both drank, plaintiff drinking very little. Immediately after drinking the beer defendant grabbed her and a struggle ensued. She protested and fought until she became exhausted. During the struggle he promised to marry her and he made "every promise." She still refused and he had intercourse with her by violence. She begged him not to make so much noise as the other rooms in the house were occupied and the noise would attract the attention of the persons who occupied them. Defendant remained in the room for some time and again had carnal knowledge of her, the circumstances of which she did not recollect. He spent the next evening with her but nothing improper happened. Their relations came to a close. She became pregnant following said acts of intercourse and was delivered of a child. The defendant testified that on the morning following said acts of sexual intercourse he gave plaintiff \$20. The plaintiff testified that some time thereafter he gave her \$20 or \$30. The authors of the main and concurring opinions were manifestly of the opinion that the testimony of plaintiff was too improbable and insufficient to support the judgment as both bear heavily upon the plaintiff's statement that during the struggle in which she was overcome by violence she

begged the defendant not to make so much noise as it would attract the attention of those in the other rooms. The further fact that plaintiff's acquaintance with defendant was of brief duration, and that she was a mature woman with maternal and worldly experience stand out as potent negations of her claim that she was "tempted, allured and led astray from the path of virtue, through the influence of some means or persuasions employed by the man [defendant], until she freely consents to the sexual intercourse," or that she was overcome by physical violence. The main opinion characterizes her as "a female a long way beyond girlhood."

If plaintiff entered into an unlawful act of sexual intercourse freely and voluntarily, and without the employment on the part of the accused of any art, promise, deception, persuasion, or the exercise of any undue influence over the alleged seducee, which was calculated to overcome her reluctance and scruples, plaintiff would not, under the foregoing observation, have a cause of action for the damage suffered by her, and the act thus voluntarily entered into would not amount to seduction.

The Breon Case does not change the definition of the term seduction, used in its legal sense, in the slightest respect from the definition given by standard authors and the best considered cases treating of the subject as will hereafter appear. The facts of the instant case bring the case well within the meaning of the term as defined by the three separate opinions of a court consisting of three members, in which one justice concurred in the judgment of reversal on the sole ground that the evidence did not justify the giving of an instruction admitted to be correct as an abstract proposition of law, but which may have led the jury into the belief that the elements necessary to constitute the offense, as set forth in the instructions, had been proved. The third justice dissented generally.

Appellant has cited other cases in which the evidence adduced at the trial was held insufficient to sustain judgments for unlawful sexual intercourse, the leading one being *Baird v. Boehner*, 72 Iowa 318, 33 N.W. 694, decided in 1887, as being factually similar to the instant case. The plaintiff in that case was a school teacher, twenty-five years of age. She and defendant had engaged in acts of sexual intercourse from July, 1882, to August of that year. She testified that partly with the determination of reforming her ways she withdrew from

her former environment and went to Kansas, in September, 1882, where she remained for a period of six months. Two days after she returned to her home she went on a buggy ride with defendant and they again engaged in intercourse. This relationship continued until December, 1883. She finally became pregnant, and brought an action alleging seduction. She was a mature woman engaged in training the minds and developing the moral character of youths. There is no factual resemblance between the two cases. In the cited case there was no sufficient evidence tending to show that a false promise was made or deceit or artifice was practiced to allure plaintiff from the path of virtue, but in the circumstance of her station her lapse must be attributable to "indiscretion in permitting the intercourse to take place." It would be a harsh and unjust decree of the moral law that would apply the same rule of accountability to the youthful plaintiff in the instant case as might properly be applied in the case of mature womanhood. There is also this additional element present in the instant case which does not appear in the cited case. Appellant professed close friendship with plaintiff's sister, but notwithstanding this relationship it was with a member of her household, in the home, which should be as a fortress of protection in which virtue is secure against alluring temptations, that plaintiff's virtue was violated. The particular relationship that existed between the parties is an important element in determining the question of seduction. *De Haven v. Helvie*, 126 Ind. 82, 25 N.E. 874.

Appellant has cited cases of other states which held the evidence adduced was not sufficient to sustain a seduction judgment. We have examined the cases so holding and find none of them fairly comparable in culpable conduct to the instant case.

Both parties cite a case of this court, *Marshall v. Taylor*, 98 Cal. 55, 32 P. 867, 869, 35 Am.St.Rep. 144, decided six years after *Breon v. Henkle*, and *Baird v. Bochner*, supra, were in the books. The general facts recited in the opinion are that defendant was a man of mature years, owned large property interests, was married and residing with his family. The plaintiff was an employee of defendant, engaged as a waitress at the hotel kept by defendant. She was of the age of sixteen years and ten months, had seen considerable of the world, having resided with her mother in various localities and was

an intelligent girl for her years. The proof of seduction rested alone with the testimony of plaintiff. The defendant squarely contradicted plaintiff's evidence in every essential particular. The plaintiff's testimony was that the defendant had called upon her once before at her room in a cottage near the hotel and brought her some books. On the evening in question, he conversed with her and asked her if she ever drank any wine. He handed her a glass of wine which she drank. He poured out a glass for himself, tasted it and said it was too sweet. Plaintiff testified that very soon after drinking the wine her head commenced to go around and she had tingling sensations and became sick at the stomach. She said that her limbs felt heavy and numb. She described the sensations which she experienced as being peculiar and such as she had never experienced before. She arose and defendant helped her to the bed. She asked him to go away. He kissed her and told her he loved her, and assured her that he would always be her friend; that he had plenty of means and she would never want. She then yielded. She said she had no distinct recollection of what occurred after she was laid upon the bed until she felt pain. Plaintiff thereafter gave birth to a child. In an action for damages for seduction she was awarded the sum of \$25,000.

The instruction given and the court's discussion of the law and the particular situation presented by the facts of that case are singularly applicable to the facts of the instant case with the exception that there is no direct evidence that plaintiff here was affected by liquor to the degree that plaintiff claimed she was affected by drinking one glass of wine in the cited case. All other elements germane to the subject are made the subject of discussion. We quote:

"The word 'seduction,' when applied to the conduct of a man towards a female, means the use of some influence, promise, art, or means on his part, by which he induces the woman to surrender her chastity and her virtue to his embraces. There must be something more than a mere reluctance on the part of the woman to commit the act, and her consent must be obtained by flattery, false promises, artifice, urgent importunity based on professions of attachment, or the like, for the woman; and that, relying solely on said promises or professions of flattery or artifice or

importunity, she surrendered her person and chastity to her alleged seducer; and that, relying and being influenced solely by such promises, flattery, artifice, and urgent importunity, she then being chaste, surrendered her person and chastity to her alleged seducer.' After a careful examination of many cases, we are satisfied the law is fairly declared in the foregoing instruction, and that such instruction is in line with the authorities in this country. *State v. Bierce*, 27 Conn. 319; *Croghan v. State*, 22 Wis. 444; *Brown v. Kingsley*, 38 Iowa 220, 222. Modern lexicographers define seduction as the act of persuading a woman to surrender her chastity. In its ordinary acceptation, it implies a betrayal of confidence, and for that reason a great majority of this class of cases are based upon a violated promise of marriage, but this is not a universal rule by any means; for a married man may seduce a girl, and that, too, though she is aware of his marriage. There are many cases to this effect, but they have arisen generally where the injured parties, being young girls, and easily beguiled, could not be held to the plane of responsibility occupied by women possessing a wider knowledge of the world.

"In the present case we have a chaste girl, not 17 years of age, making her living far distant from her few friends, stopping at night alone in a cottage. She is visited after dark by her employer, with whom she was upon friendly terms, a man of wealth and years. After a conversation upon ordinary topics, lasting some time, he gives her a glass of wine which she drinks, and her mind is seriously affected thereby. He expresses affection for her, repeatedly caresses her, makes promises of future friendship and assistance, and, after all these things have been going on for some length of time, he seduces her; at least a recital of these events would picture a case of seduction to the ordinary mind. They do not disclose a cold, deliberate transfer of virtue for a consideration. Neither do they describe a sacrifice of virtue to the demands of lustful passion; but the blandishments, the expressions of friendship, the promises, the wine, weapons of the seducer, were all there. If the plaintiff were a woman of years, with that knowledge of the world which age brings with it at the present day, the case might present a different aspect. The struggle would not have been so unequal, and she would have been held

to a stricter responsibility. But we cannot charge her with that judgment and discretion which come only with age and experience. The drinking of the wine seriously affected her, and its administration alone may be well termed an artifice that conduced to her downfall. If these things which she has said be true, (and the jury has so found the facts,) her cause of action is supported by the evidence."

The word "seduction," when used with reference to the conduct of a man toward a female, has a precise and determinate signification. The accepted definition is fully stated in 57 Corpus Juris, page 10, supported by many citations of cases, as follows: "Thus the word 'seduce' in its common as well as legal acceptance, imports the idea of illicit intercourse, accomplished by arts, promises, or deception"; the wrong of inducing a female by enticements and persuasions overcoming her reluctance and scruples; the use of arts, persuasions, or wiles to overcome the resistance of a female who is not disposed of her own volition to step aside from the paths of virtue." See, also, 24 R.C.L., §§ 3-10, pages 732-738 and cases cited. In some cases the words "urgent importunity" are used instead of "persuasion." Considered with respect to the context, both terms express the same meaning.

The evidence clearly supports the finding of the trial court that the acts of the defendant are within the definition and meaning of the word "seduction" as judicially defined. Moreover, if the defendant committed the acts of intercourse as charged at a time when plaintiff was under the age of eighteen years, the fact that in so doing he also committed the crime of rape, would not exempt him from liability in an action charging seduction even though the acts charged were perpetrated without regard to any of the means necessary to make out a case of seduction. "The fact that defendant has committed the offense of rape, as well as seduction, only aggravates the latter injury and furnishes ground for exemplary damages." 24 R.C.L., § 4, p. 734; *Marshall v. Taylor*, 98 Cal. 55, 32 P. 867, 35 Am.St. Rep. 144; 57 Cor.Jur., p. 14, and supporting cases.

Appellant has devoted considerable space in his brief to supporting certain observations made by Justice Thayer setting forth his personal views as to the degree and kind of proof that should be required to

substantiate a charge of seduction. The reasons given in justification of a departure from settled judicial pronouncements, and in some cases statutory regulations, are: "The individuality of the female sex has been advanced during the past few years. Their knowledge of the world has been greatly improved, and their legal capacity enlarged. The notion that they belong to the weaker sex is only entertained by the credulous and unsophisticated. They are not easily beguiled, and should be held to a reasonable responsibility; and if allowed to maintain an action for their own seduction, and demand a large compensation for their loss of character, should be required to prove something more than mere importunity as the means through which it was accomplished. I have but little faith in the merits of such a law." He concludes his views on the subject divining that the law, unless interpreted to meet his views, will be resorted to more frequently by the unscrupulous than by the more womanly "who would be inclined to smother their disappointment and grieve over the wrong, while the unscrupulous would make it a matter of public parade and profit." It is further stated that the radio, moving pictures, the widened field of female activities, and widespread dissemination of information with reference to sexual relations have given the womanhood of today a better understanding of the moral duty that should guide their relations with men than existed when the Breon Case was written fifty years ago. Whether the inventions, creations, the startling developments of science, and the entry into broader fields of social and political activity have had or should have had the effect of quickening moral responsibility and duty or have made it easier for the sex to conquer human emotions and passions or have hedged in female chastity with walls of protection which did not heretofore exist, are questions affecting public morals of which legislatures may take cognizance. There has never been a time in the history of the civilizations which observe a moral code, that the female sex has been in ignorance as to the magnitude of the misery and ruin which unlawful seduction inflicts upon transgressors. This age-old sin has been the concern of motherhood since the earliest civilizations and daughters in early girlhood in the ages past have not been ignorant as to its inexorable penalties.

It may be observed further that notwithstanding our intellectual advancements

there have been more statutes enacted for the protection of the morals of youths since the Breon decision, 1887, than were in our statutes at the time it was written. In fact, the Legislature in defining rape has since that day raised the age of consent of the female from sixteen years to eighteen years, thereby making voluntary intercourse with a female under that age rape. Many laws designed to protect female chastity and the morals of the youths have been enacted notwithstanding the marvelous intellectual advancements made during the past half century.

If the arguments of appellant rest upon sound moral grounds, they should be addressed to the law-making branch of government rather than to the judicial branch.

The complaint contains ten paragraphs numbered in numerical sequence. The findings refer to the paragraphs in their numerical order and find each to be true as alleged in the complaint except as to No. IX which alleges general damages in the sum of \$50,000. The corresponding finding reduced that amount to the sum of \$10,000. The prayer of complainant was for the further sum of \$10,000 by way of exemplary damages.

[5,6] Several exceptions are taken to the findings based on the contention that certain of them are not wholly supported by the evidence, and the court improperly included them in computing the amount which it found would fairly compensate for the damages suffered by plaintiff. One of the grounds of objection is based on allegations contained in paragraph X of the complaint, on information and belief, to the effect that the defendant was a man of wealth and was well able to pay for the irreparable damage done plaintiff. No evidence was tendered by plaintiff which in any way related to the defendant's financial standing, except incidentally, the testimony of plaintiff that the defendant during a period of amative relations asked her if she could live on \$250 per month. The defendant was examined by his attorney as to his financial ability and he said his salary as traveling salesman was \$225 per month and that was his only source of income and he owned no property of any kind except an equity in his household furniture. The inquiry went no further.

An examination of the findings as a whole makes it very certain that the court did not consider the financial standing of

the defendant in forming its judgment as the findings, by specific reference, were unquestionably based on general damages and nothing was allowed by way of exemplary damages or special damages as to which there were no allegations or proof as to the amount. The few references made to the necessity of obtaining the services of a physician to relieve the pregnancy which defendant admitted he aided and abetted by furnishing medicine, were merely recitals of conditions which were consequent, or incidental to, and descriptive of the acts charged. The complaint was not framed on the theory that special damages were sought. No demurrer was interposed or motion was made to strike out any part of the complaint on the grounds of uncertainty, irrelevancy or immateriality, or for any other alleged defect. The complaint alleged the first act of sexual intercourse was committed about September 8, 1935. Early at the trial she testified that the first act was committed in August of that year, just as she was on the eve of departure to her parents' home. That testimony was objected to by defendant and the plaintiff asked leave to amend by including the first act of seduction in her complaint. The trial court took the view that it was not necessary to make the formal amendment and treated the act as an issue in the case. Plaintiff was fully cross-examined by defendant as to this act of intercourse. His point is that if the plaintiff had intercourse prior to the time alleged in the complaint as filed, she was not, on September 8, 1935, a female of previous chaste character. But the fact is that if she was defiled in August it was by him and no one else. If he did not have intercourse with her in August, but did have such relations later as admitted by him, she was at the time alleged in the complaint, a female of previous chaste character and the pleadings and evidence remain amply sufficient to sustain the judgment. In either event, he was the original violator of her chastity.

[7,8] Lastly, the judgment is attacked on the grounds that it is exorbitantly excessive and a new trial should be ordered. The cause was tried by the court, a jury having been waived. "As a result of the difficulty in laying down any fixed rule of damages it is generally held that the action for seduction * * * is exempted, by peculiar considerations from the interference of the courts on the ground of excessive damages, and unless, under extraordinary

circumstances, as where the verdict is so great as to raise the suspicion of partiality, passion, prejudice or corruption, the finding of the jury will not be disturbed. Damages are the peculiar province of the jury, and it is their judgment and not that of the court, which is to determine the amount of such damages. Even at common law in this class of cases, verdicts of juries were seldom held to be excessive, even when the parent recovered on the fiction of loss of service, and there has been held to be even less reason for disturbing a verdict when the plaintiff is the woman seduced." The foregoing quotation is taken from 24 Ruling Case Law, page 759, and is buttressed with ample authorities. In the instant case the amount awarded by the judgment was not assessed by a jury's verdict, but is the result of the trial court's calm and judicial determination. In such cases, we are bound by the judgment.

Judgment affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; HOUSER, J.



10 Cal.2d 590

ROSENBERG v. LAWRENCE et al.

S. F. 15901.

Supreme Court of California.

Feb. 2, 1938.

1. Attorney and client ☞158

Even if contract between custom house broker acting for an importer and attorneys by which attorneys were employed to recover from the United States government refunds due on duties paid by importer was invalid because of provisions for payment of a portion of attorneys' fees to broker, attorneys would be entitled to recover on quantum meruit.

2. Attorney and client ☞182(2)

Even if there was a valid contract between attorneys and importer acting through custom house broker to employ attorneys to recover funds due on duties paid by importer for payment to attorneys of a contingent fee, the contract would not give attorneys a lien on or an interest in judgment authorizing a

recovery of refunds by importer or in subject matter of such litigation.

3. Action ⇨6

In importer's action against attorneys and custom house broker for declaratory relief based upon a controversy as to compensation of attorneys for their services in recovering refunds from government, where attorneys claimed under an express contract made by broker for importer which provided for payment of 50 per cent. of amount recovered, judgment that attorneys were entitled to half of refund and broker to one third of half was erroneous, as against contention that express contract was valid and that court could do equity and declare part of refund to belong to attorneys in such action.

4. Equity ⇨1

A court of equity may exercise broad powers in applying equitable remedy, but it may not create new substantive right under guise of doing equity.

HOUSER, SEAWELL, and CURTIS, JJ., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action for a declaratory judgment by Harry Rosenberg, an individual doing business under the firm name and style of the American Products Company, against Frank L. Lawrence and George R. Tuttle, as copartners doing business under the firm name and style of Lawrence & Tuttle, and others, wherein the named defendants filed a cross-complaint. From a judgment in favor of the defendants and the cross-complainants, the plaintiff appeals.

Judgment modified and, as modified, affirmed.

Prior opinion, 69 P.2d 200.

Clyde C. Sherwood, of San Francisco, for appellant.

Perry Evans and Harold E. Haven, both of San Francisco, for respondents Lawrence & Tuttle.

Hart H. North, of San Francisco, for respondent Pitt.

PER CURIAM.

Following a transfer of the above-entitled cause to this court after decision and judgment by the District Court of Appeal,

CAL. REP. 75-76 P.2d-15

First Appellate District, Division 2, this court is satisfied with the opinion rendered by that court and division, written by Mr. Associate Justice Spence, as follows, and adopts the same as and for the decision and opinion of this court:

"Plaintiff, an importer, filed his complaint for declaratory relief. The defendants Lawrence and Tuttle were attorneys at law and defendant Pitt was a custom house broker. Defendants filed separate answers, and in addition thereto the defendant attorneys filed a cross-complaint. The cause was tried by the court sitting without a jury and judgment was entered in favor of defendants and cross-complainants as follows: 'That the defendant attorneys have and recover against plaintiff the sum of \$1,348.-60'; that the refunds due upon duties paid by plaintiff to the United States government belonged to the defendant attorneys 'to the extent of the said recovery against the said plaintiff'; and that one-third of the amount recovered by the defendant attorneys belonged to the defendant broker. Plaintiff appeals from said judgment.

"The record on this appeal is not wholly satisfactory, as the findings of fact, which are referred to in the briefs, are not included in the transcript. It is conceded by plaintiff, however, that the trial court made a finding that 'all of the allegations of the answers of the defendants and of the cross-complainants are true,' and this admitted finding appears sufficient for the purposes of this discussion.

"The complaint alleged a controversy between the parties concerning the compensation claimed by the defendant attorneys for services rendered in connection with the recovery of certain refunds upon duties paid to the government upon the importations by plaintiff of cotton rags. In their cross-complaint defendant attorneys alleged that in 1930 they were employed by plaintiff as attorneys to prepare and file the necessary protests, to appear for plaintiff before the United States Custom Court and the Treasury Department, and to do all things necessary and advisable to obtain refunds from the government upon the duties paid upon said importations. They further alleged that defendant attorneys entered upon their employment and rendered all necessary services and had ultimately obtained stipulations for the entry of judgments against the government for refunds to plaintiff in the sum of \$2,697.20. It was then alleged that the reasonable value of

said services was the sum of \$1,348.60, which sum plaintiff had refused to pay upon demand. There was ample evidence to sustain the trial court's findings that said allegations were true, and therefore the portion of the judgment awarding said sum to the defendant attorneys finds ample support.

"The parties, however, have devoted their briefs largely to the consideration of other points. It appeared from the evidence that the defendant broker had acted as the custom house broker for plaintiff for many years; that, when it became necessary to go into the United States Customs Court to attempt to recover their refunds, the defendant broker advised plaintiff that he could not handle the cases before said court and that it would be necessary to employ an attorney; that plaintiff authorized the defendant broker to do all things necessary for that purpose and said broker thereupon employed the defendant attorneys; that, pursuant to a general understanding between said broker and said attorneys, all cases referred to said attorneys by said broker were to be handled by them on a 50 per cent. contingent basis and the said broker was to receive 33⅓ per cent. of said 50 per cent.; that plaintiff did not know who were employed as attorneys until several years later when the stipulations were finally obtained; that plaintiff had not theretofore been advised of the agreement between said broker and said attorneys regarding the fee to be charged the plaintiff or of the agreement for the broker's participation therein. It further appeared from the evidence that a 50 per cent. contingent fee was a reasonable and customary fee for handling of said cases but that in particular cases, a smaller fee was sometimes agreed upon.

[1] "The main points raised by plaintiff are based upon the theory that under the pleadings and evidence no recovery could be had against plaintiff except upon an express contract of employment and that the judgment must be reversed in its entirety as the express contract was invalid. These points are all related to plaintiff's first main point, which is stated as follows: 'The contract of employment between the attorneys and the client is not binding upon the client and cannot be made the basis of an action for attorneys' fees on the part of the attorneys, because it is illegal, void, and contrary to public policy.' In support of his contentions, plaintiff cites and relies upon *Auerbach v. Curie*, 119 App.Div. 175, 104 N.Y.S. 233; *Id.*, 126 App.Div. 836, 111 N.

Y.S. 327; *Reilly v. Beekman*, 2 Cir., 24 F. 2d 791; *Alpers v. Hunt*, 86 Cal. 78, 24 P. 846, 9 L.R.A. 483, 21 Am.St.Rep. 17; 3 Cal. Jur. 689, § 89 and other authorities. We deem it unnecessary to discuss those points, for, even assuming that the express contract was invalid because of the provision providing for payment of a portion of the fee to the broker, the attorneys were nevertheless entitled to recover upon a quantum meruit. 2 R.C.L. 1046.

[2-4] "We now come to a consideration of plaintiff's contentions with respect to the second and third portions of the judgment as entered. The second portion reads as follows: 'And it is hereby further ordered, adjudged and decreed that all refunds due from the United States Government of duties paid by the said plaintiff upon the importations mentioned in the said complaint belong to said Lawrence & Tuttle as copartners as aforesaid, and they are entitled to receive the same, to the extent of the said recovery against the said plaintiff hereinabove mentioned, and said refunds shall be applied by the said Lawrence & Tuttle upon the said recovery, as received by them, until this judgment has been satisfied.' The third portion reads as follows: 'And it is hereby further ordered, adjudged and decreed that one-third of all said sums received by said Lawrence & Tuttle shall, upon such receipt, belong to said George H. Pitt, who shall thereupon become entitled to receive the same.'

"Plaintiff contends that the trial court erred in including said second and third portions in the judgment herein, and in our opinion this contention must be sustained. Even if there was a valid express contract for the payment to the attorneys of a contingent fee, it is conceded that such contract would not give rise to a lien upon or an interest in the judgment or the subject-matter of the litigation. *McGown v. Dalzell*, 72 Cal.App. 197, 236 P. 941; *Gage v. Atwater*, 136 Cal. 170, 68 P. 581; *Hogan v. Black*, 66 Cal. 41, 4 P. 943; *Mansfield v. Dorland*, 2 Cal. 507. But defendants attempt to justify these portions of the judgment upon the ground that the express contract was valid and that 'plaintiff having sought equitable relief (declaratory judgment) the door was open for the court to do equity.' This position is untenable. The refunds belonged to plaintiff and the declarations in the judgment to the contrary were not proper even in this action for equitable relief. While a court of equity may exercise broad

powers in applying equitable remedies, it may not create new substantive rights under the guise of doing equity."

The judgment is modified by striking therefrom the second and third portions thereof which are above set forth and, as so modified, the judgment is affirmed. The parties will bear their own costs on this appeal.

HOUSER, CURTIS, and SEAWELL,
Justices (dissenting).

We dissent.

From the record herein, it appears that plaintiff is an importer; that defendant Pitt is a customs broker; and that defendants Lawrence & Tuttle are attorneys who specialize in the business of representing clients who are claimants for rebates or refunds on tariff charges or duties which theretofore have been paid by them to the United States government. In the conduct of his business, plaintiff imported a large quantity of cotton rags upon which he paid a considerable amount of duty or tariff. In that transaction defendant Pitt acted as plaintiff's customs broker. As the result of some research, the idea was conceived that the cotton rags were not properly subject to as large an amount of duty as had been paid, and thereupon defendant Pitt was authorized by plaintiff to do all things necessary, including the hiring of an attorney, to attempt to obtain a rebate or "refund" with respect to such payment. To that end, in plaintiff's behalf defendant Pitt employed defendants Lawrence & Tuttle on a contingent fee basis; that is to say, as far as plaintiff was informed, that to whatever extent a rebate might be recovered, defendants Lawrence & Tuttle should become entitled to retain for their own use 50 per cent. thereof for the performance of their services in that regard, and that plaintiff should be entitled to the remainder of such rebate. But, without the knowledge or the consent of plaintiff, it was further agreed between defendant Pitt on the one side and defendants Lawrence & Tuttle on the other that, of the fee which might be thus received by the latter, defendant Pitt would be paid one-third; which arrangement had the effect of reducing the contingent fee which actually was proposed to be received by Lawrence & Tuttle from 50 per cent. to 33⅓ per cent. During the pendency of the proceedings in the matter of attempting to recover such

rebate, in a similar proceeding that had been instituted by a third person, in which neither plaintiff nor his attorneys herein was or were respectively in any wise connected, a final ruling was made to the effect that cotton rags were not dutiable, with the result that, by subsequent stipulation of the interested parties, plaintiff herein became entitled to, and was awarded, a refund of the entire amount of money which theretofore he had paid as a duty or tariff upon the importation of said cotton rags.

Upon the application of an elementary rule of agency, it becomes clear that, by reason of the undisputed fact that at all times throughout the transaction defendant Pitt was acting as the agent of plaintiff, and that in the course of such agency, without the knowledge or the consent of plaintiff, he entered into an agreement with Lawrence & Tuttle to the effect that the amount of the fee which Lawrence & Tuttle might earn or become entitled to receive would be divided or "split" between Lawrence & Tuttle on the one side, and Pitt on the other, was in fraud of plaintiff, was violative of the duty which Pitt owed to plaintiff, and was contrary to public policy. As a consequence of that situation, Pitt cannot be permitted to receive any part of such contemplated fee.

In the lower court the defendants Lawrence & Tuttle made no claim against plaintiff on the basis of the fact that theretofore they had rendered services to him in accordance with the provisions of a contingent fee contract that theretofore had been entered into between the respective parties thereto, but instead thereof, the defendants Lawrence & Tuttle relied upon the fact alleged both in their answer and in their cross-complaint to the effect that they had been employed by plaintiff and that they had performed certain services for him of the reasonable value of a specified sum of money, equal to 50 per cent. of the amount of the refund, and that plaintiff had neglected and refused to pay them for such services. And that was the basis on which judgment was rendered by the lower court in favor of the said defendants.

In accordance with the facts, if for the reasons hereinbefore indicated, it may be assumed that the contingent fee contract was void and that it was not relied upon by the defendants Lawrence & Tuttle as affording a legal foundation for the recovery of a judgment against plaintiff,

the determinative question herein relates to whether, the entire situation considered, the defendants Lawrence & Tuttle are entitled to be compensated for the performance of services by them for plaintiff on the basis of the reasonable value thereof.

In 2 R.C.L. 1046, and in 5 Am.Jur., p. 367, the various rules that relate to the rights of the respective parties, especially in connection with an asserted right to be compensated for the reasonable value of services that have been performed in pursuance of an illegal contract, are succinctly set forth. And, in connection with circumstances that are analogous to those herein presented, the authorities therein cited appear to be to the effect that although a contract that has been entered into between an attorney and his client for the performance of services by the former for the latter may be void because of lack of power in one or both of the parties thereto to make it, or because of some irregularity in its execution, or the like, nevertheless, if the contract does not violate public policy, "and is not in any way tainted with immorality or illegality, * * * the attorney may recover upon a quantum meruit for the reasonable value" of the services that have been performed by him. 5 Am.Jur. p. 367.

In the light of that principle, and in order that the instant agreement may be tested thereby, it may be advisable that the subject-matter as well as some of the elements of the contract be given consideration. Intrinsically, it involved the proposed recovery of money which it was claimed theretofore had been wrongfully exacted from and paid by plaintiff. In that regard, as embracing a matter of legal right, no fair-minded person could properly complain. On its face, in substance, the contract was that one of its parties should perform certain services, for which in effect, contingent upon the collection of any amount of money as rebate, the other agreed to pay a specified percentage of any money that might be thus collected. Nor in accord with well-established rules of law in this jurisdiction did the fact that the stipulated compensation which was to be paid to the attorneys for services proposed to be rendered by them in their efforts to recover such money depended upon the fact of successful outcome of the matter, or upon the measure of such success, offend our standard of accepted good morals. As a matter of law, it therefore is inconceivable

that either the subject-matter of the contract or the consideration to be performed or rendered by either of its parties, respectively, could have been successfully questioned from the standpoint of whether it was in violation of the moral code or so-called public policy. However, the money consideration that was intended to be paid by plaintiff was just as great an element in the fundamentals of the contract as was the matter of specified services that were proposed to be rendered by the defendants. Each was the "quid pro quo" of the other; and, by the respective parties, each of such considerations was assumed to be the equal of the other. Assumedly, and for aught that appears, any diminution in pecuniary consideration that was to be rendered by plaintiff would have been subject to objection by the defendants, just as plaintiff would have been justified in complaining had the defendants failed in their duty to render to plaintiff honest, efficient and faithful service. Dependent entirely upon such success, if any, as might be attained, plaintiff was obligated to pay a fixed percentage of compensation—no more, no less. Plaintiff was financially interested in obtaining the services of the defendants for the least possible percentage of the rebate or the refund that might be recovered. Outwardly, and avowedly, as between plaintiff and the defendants Lawrence & Tuttle, assumedly that percentage was fixed at 50 per cent.—when as a matter of fact, in accordance with "arrangements" that had been made between the said defendants and plaintiff's trusted agent, the said defendants were willing and agreed to perform their services for 33⅓ per cent. In other words, from a legal standpoint, defendants Lawrence & Tuttle induced plaintiff's agent to represent to plaintiff that he would be obligated to pay to the said defendants 50 per cent. of any amount that might be recovered; when in truth all that the said defendants demanded, and all that was to be paid to them individually, was 33⅓ per cent. of such amount. In contemplation of the law, the proposed conduct of plaintiff's agent, in which he was knowingly aided and abetted by the said defendants, was nothing less than legal fraud; and in its contemplated consummation one of such parties was equally guilty with the other. Otherwise stated, as far as plaintiff was concerned, in the element of consideration of the contract, in effect it was proposed by the said de-

fendants that plaintiff be deceived and cheated out of a considerable sum of money, and that the said defendants would collaborate with plaintiff's agent in bringing about that untoward result. Furthermore, although the said defendants were not attorneys authorized to practice their profession as such within the courts of the state of California, nevertheless they assumed to act in that capacity, inasmuch as they were duly admitted to practice and actually were practicing as customs attorneys. As such, in representing clients, and especially plaintiff herein, a fiduciary relationship was created and existent, which required the said defendants at all times to exercise the highest good faith toward plaintiff. That by concealment of material facts from plaintiff, thereby deceiving him with regard to the fee which he would be required to pay, and particularly in withholding from him the details of the "arrangement" that had been entered into between them and Pitt, the said defendants disregarded and violated the duty which in good morals they owed to plaintiff in the premises.

In the case of *Alpers v. Hunt*, 86 Cal. 78, 24 P. 846, 9 L.R.A. 483, 21 Am.St. Rep. 17, wherein was involved a situation similar to that which herein appears, the question of the duty which an attorney owes to his client, particularly with reference to the impropriety of "splitting" a fee with a layman, was given thorough and painstaking consideration. As far as the point here at issue is concerned, the syllabus to the case correctly indicates the ruling that was therein made as follows: "A contract between a third person not an attorney and an attorney and counsellor at law, that he will procure the attorney's employment by a litigant, and that in consideration of such procurement he is to have from the attorney so employed one third part of whatever remuneration the latter receives for his services from the litigant, is contrary to public policy and invalid."

Likewise in the case of *Reilly v. Beekman*, 2 Cir., 24 F.2d 791, 792, which also closely resembled the instant case in its principal facts, and wherein the various pertinent authorities were given consideration, it was held that a contract such as that which was entered into between the parties to the instant matter was "against public policy."

And in the case of *Auerbach v. Curie*, 119 App.Div. 175, 104 N.Y.S. 233, 235, in

which the foundational facts were strikingly similar to those here presented, the conclusion was the same. In substance, that was a customs case in which a broker instituted an action against an attorney to recover a judgment for the broker's asserted share of a fee that had been paid to the attorney for recovering a refund of duty that had been paid by the broker's principal. In ruling on the question here under consideration, in part it was there said: "The plaintiff was the agent of Simon Auerbach & Co., and it was a part of his obligation toward his principals to prevent, if he could, the payment by them of excess duties on their imports. If he assumed to employ an attorney for them, or to procure a contract from them for such employment, to recover the duties improperly paid, he could not in fairness to Simon Auerbach & Co., and in good morals, without their knowledge and consent, act as agent for the attorney also in procuring a contract from them to him, and make an agreement with the attorney, who knew he was so acting, for the payment to himself of a part of the fee to be charged. It was his duty to obtain the services of such attorney at as reasonable a price as he might be able, without any profit to himself. Any secret agreement which he might make for the sharing of the attorney's fee was, not only a breach of trust against his principals, but against good morals and public policy, and a contract which the law will not enforce. * * * 'The contract itself is void as against public policy and good morals, and both parties thereto being in *pari delicto* the law will leave them as it finds them.'" To the same legal effect see: *Wolfe et al. v. International Reinsurance Corporation*, 2 Cir., 73 F.2d 267; *Deakin v. Scheuer*, 182 Wis. 234, 196 N.W. 222; *Rice v. Wood*, 113 Mass. 133, 18 Am.Rep. 459; *Rabinowitz et al. v. Pizer*, Sup., 108 N.Y.S. 994; *Nekarda v. Presberger*, 123 App.Div. 418, 107 N.Y.S. 897; *Bollman v. Loomis*, 41 Conn. 581; *Lynch v. Fallon*, 11 R.I. 311, 23 Am.Rep. 458; *Gray v. Pankey*, 211 Ala. 539, 100 So. 880; *Everhart v. Searle*, 71 Pa. 256; *Rice v. Davis*, 136 Pa. 439, 20 A. 513, 20 Am.St. Rep. 931; *Raisin v. Clark*, 41 Md. 158, 20 Am.Rep. 66.

From the foregoing considerations, it must result as in effect is negatively or by implication expressed in 2 R.C.L. p. 1046, and 5 Am.Jur. p. 367, to which reference hereinbefore has been had, that even though in itself the principal subject-

matter of the instant contract was legally unobjectionable, since it also has been made to appear that in at least one of its fundamentals it was violative of public policy, the entire contract became tainted and contaminated—from which situation its illegality inevitably should be decreed.

The illegality of the instant contract being thus established, the question of the right of defendants Lawrence & Tuttle to recover from plaintiff as for the reasonable value of the services that were rendered by the said defendants to plaintiff remains for consideration.

At the outset, it should be noted in this regard that the authorities are not entirely harmonious one with the other or the others. Reverting to the text in 2 R.C.L. 1046, it may be noted that, after directing attention to "an obvious distinction bearing upon the right of an attorney to recover on a quantum meruit for services rendered pursuant to an illegal contract, between a case where the contract is illegal because the services agreed to be rendered in the performance thereof are illegal, and a case where the contract is illegal only because of some improper provision relating to the mode of compensation, or an illegal stipulation against the right of the client to compromise the claim without the consent of the attorney"—the author of the commentary continues as follows: "It is apparent, in the first case, that every objection to permitting a recovery upon an express contract applies with equal force to a recovery upon a quantum meruit. And this is true even when the services are not intrinsically illegal, but are improper and contrary to public policy because of the circumstances under which they are rendered."

The same principle, with appropriate comments thereon may be noticed in the case of *Roller v. Murray*, 112 Va. 780, 72 S.E. 665, 666, 38 L.R.A., N.S., 1202, Ann. Cas. 1913B, 1088, wherein it was held that a contract whereby an attorney agreed to undertake and carry on litigation at his own risk and without cost to his client for a share of the recovery was contrary to public policy and void and that no recovery could be had "on a quantum meruit," because the law will not aid either party to an illegal agreement. It leaves the parties where it finds them. In rendering its decision therein, in part, the court said: "The general rule is that

where an agreement is treated as void merely because it is not enforceable, as in cases under the statute of frauds or of parol agreements where the contract is not in writing and money is paid or services are rendered under it by one party and the other avoids it, there can be a recovery upon an implied assumpsit for the money paid or the value of the services rendered. In such cases there has been the mere omission of a legal formality, and while by the terms of the statute he must lose the benefit of his contract, yet, there being nothing illegal or immoral in it, he is entitled to be compensated for the services rendered under it."

The following pertinent language also appears in the opinion: "A champertous agreement being unlawful, it would seem clear that compensation for services rendered under it could not be recovered upon a quantum meruit, any more than upon the agreement itself, without overturning the very foundations upon which the rule refusing to enforce unlawful agreements is based. Of what value would the rule be, if the courts permit that to be done by indirection which they refuse to allow to be done directly? Why say to the attorney, 'You shall not recover upon the champertous agreement the agreed value of the services rendered by you, but you may recover upon an implied contract (which in fact never existed) the value of such services,' which in this case is claimed and shown to be the same as the agreement provided for? How would any such result uphold the policy of the law, deter others from entering into similar contracts, or promote the public good? To permit a recovery upon a quantum meruit, instead of discouraging, would encourage, the making of such contracts; for, if the client kept and performed his unlawful agreement, the attorney would get the benefit of it, and, if he did not, the attorney would suffer no loss, since he could recover upon the quantum meruit all that his services were worth. Any process of reasoning which leads to such a result we think must be unsound."

To the same effect see *Reilly v. Beekman*, 2 Cir., 24 F.2d 791; *Mazureau v. Morgan*, 25 La. Ann. 281; *Butler v. Legro*, 62 N.H. 350, 13 Am. St. Rep. 573; *Bowman v. Phillips*, 41 Kan. 364, 21 P. 230, 3 L.R.A. 631, 13 Am. St. Rep. 292; *Moreland v. Devenney*, 72 Kan. 471, 83 P. 1097, and *Barngrover v. Pettigrew*, 128 Iowa 533, 104 N.W. 904, 2 L.R.A., N.S., 260,

111 Am.St.Rep. 206; also, analogously, authorities cited in 85 A.L.R. 1368 et seq.

And in principle, the rulings by the appellate tribunals of this state are in accord: *Bank of Orland v. Harlan*, 188 Cal. 413, 421, 206 P. 75; *Maryland Casualty Co. v. Fidelity, etc., Co.*, 71 Cal.App. 492, 236 P. 210, and *Pacific Electric Ry. Co. v. Bonding, etc., Ins. Co.*, 55 Cal.App. 704, 707, 204 P. 262.

It follows that the judgment should be reversed.



24 Cal.App.2d 565

STEFANUTO et al. v. MARKET ST. RY. CO. et al.
Civ. 10387.

District Court of Appeal, First District,
Division 1, California.

Jan. 27, 1938.

Rehearing Denied Feb. 26, 1938.

Hearing Denied by Supreme Court
March 28, 1938.

1. Master and servant ⇨333

When recovery is sought against a principal and his agent, based upon the negligence of the agent which was not directed or participated in by the principal, and for which the principal's responsibility is simply that cast upon principal by reason of relationship with the agent, a judgment in favor of the agent will relieve the principal of responsibility.

2. Master and servant ⇨333

In action against street railroad and conductor to recover for injuries sustained by passenger while alighting from street car, where evidence supported finding that some negligent agent other than the conductor named as defendant was in charge of the car which caused the injury, street railroad was not relieved of liability notwithstanding conductor was found not liable.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Lidia Stefanuto and Pio Stefanuto, her husband, against the Market Street Railway Company, a corporation, and Clarence J. Dolmseth, to recover for injuries sustained by the wife while alight-

ing from defendant corporation's street car. Judgment against the defendant corporation and in favor of Dolmseth, and the defendant corporation appeals.

Affirmed.

William M. Abbott, Cyril Appel and Ivores R. Dains, all of San Francisco, for appellant.

J. A. Pardini, of San Francisco (Joseph A. Sheehan, of San Francisco, of counsel), for respondents.

PER CURIAM.

An appeal from a judgment against defendant corporation. The action arose from injuries received by plaintiff Lidia Stefanuto, who fell from the rear step of a car operated by the corporation, the accident being caused by the sudden starting of the vehicle. Defendant Dolmseth was in the employ of the corporation as a conductor, and it was alleged that he and another—who was joined as a fictitious defendant but not served with summons—were operating the car and that their negligence caused the damage. The allegation that Dolmseth was in charge of the car, together with those of negligence and damage, were denied. The cause was tried by a jury, which returned a verdict in favor of Dolmseth and against the corporation.

The latter contends that the judgment—which has become final in favor of its employee—exonerates it from liability.

According to Dolmseth's testimony he did not see the plaintiff on the occasion of her alleged injury; and he denied that any accident occurred on the car on which he was employed. The evidence clearly shows the fact of the accident and that plaintiff was injured, and plaintiff's husband identified Dolmseth as the conductor of the car. It was not alleged that Dolmseth was the person who had exclusive charge of the operation of the car; and the corporation, as one ground for its claim that no accident happened, sought to show that he was employed on a car other than the one upon which plaintiff was riding.

[1,2] It is the rule that when recovery is sought against the principal and his agent based upon the negligence of the agent not directed or participated in by the principal, and for which the latter's responsibility is simply that cast upon him by reason of his relationship with his agent,

a judgment in favor of the agent will relieve the principal of responsibility. *Bradley v. Rosenthal*, 154 Cal. 420, 97 P. 875, 129 Am.St.Rep. 171. Here, however, the testimony as to Dolmseth's presence on the car was conflicting; he impliedly denied the fact; and although it was so testified the jury was not concluded thereby; and their conclusion to the contrary and that some other negligent agent was in charge is supported by the evidence. *Timbrell v. Suburban Hospital, Inc.*, 4 Cal.2d 68, 71, 47 P.2d 737. See, also, *Garrison v. Everett*, 112 Neb. 230, 199 N.W. 30; *Donald v. Atlantic, etc., Ry. Co.*, 117 S.C. 4, 108 S.E. 180; *Lake Erie & W. Ry. Co. v. Reed*, 57 Ind.App. 65, 103 N.E. 127.

We have also examined an instruction of which the corporation complains; but in view of the pleadings, the evidence and other instructions given we find nothing therein supporting the contention that the same was prejudicially erroneous.

The judgment is affirmed.



24 Cal.App.2d 673

PEOPLE v. CURRAN.

Cr. 3060.

District Court of Appeal, Second District,
Division 2, California.

Feb. 2, 1938.

Hearing Denied by Supreme Court

Feb. 24, 1938.

1. False pretenses ☞20

The distinction between "larceny" and "obtaining money by false pretenses" depends upon the intention with which the owner of the property parted with it to the person taking it; in "larceny," the owner having no intention to part with his property to the person taking it, although he may intend to part with possession, while in "false pretenses" the owner does not intend to part with his property, but it is obtained from fraud.

[Ed. Note.—For other definitions of "Larceny" and "Obtaining Money or Property on Credit on Materially False Statement," see Words & Phrases.]

2. False pretenses ☞49(4)

Evidence that accused advertised for a partner in business of selling "business op-

portunities," that when complaining witness responded to the advertisement, accused made false statements as to profits accused had made in the business, that accused offered witness a partnership for \$500, which witness accepted, that witness gave accused a certified check for the amount, but not until partnership papers were executed, that thereafter furniture was removed from office, whereupon accused told witness that partnership had ended, *held* to show the offense of "obtaining money by false pretenses."

3. False pretenses ☞49(1)

Where the offense shown by evidence was that of obtaining property by false pretenses, it was incumbent upon the prosecution, in absence of proof that the pretenses, or some note or memorandum thereof were in writing, to prove the pretenses by the testimony of two witnesses or that of one witness and corroborating circumstances. Pen. Code, § 1110.

4. False pretenses ☞49(1)

Evidence which came solely from testimony of complaining witness *held* insufficient to support conviction for obtaining property by false pretenses, in view of statute requiring corroborating testimony, as against contention that testimony of another witness was corroborative, where such other testimony referred to a different transaction by accused. Pen.Code, § 1110.

5. Criminal law ☞1173(1)

The failure to instruct jury that accused could not be convicted of obtaining property by false pretenses unless the pretenses were proven by testimony of two witnesses or by corroborating circumstances constituted reversible error. Pen.Code, § 1110.

6. Criminal law ☞824(1)

Although it is not the duty of the court to give instructions to jury upon specific points developed by evidence unless such instructions are requested, it is nevertheless the duty of the court in criminal actions to give jury instructions on general principles of law pertaining to the case on trial.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Murray Curran was convicted of grand theft, and he appeals.

Reversed and new trial ordered.

Donald Kolts, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

WOOD, Justice.

In an information defendant was charged with the crime of grand theft, in that he willfully and feloniously took \$500, the personal property of Arthur Reshman. A jury returned a verdict of guilty, and the defendant appeals from the judgment and from the order denying his motion for a new trial.

According to evidence presented by the prosecution, defendant and one Whiting entered into a partnership under the name "Ideal Investment Company" on June 8, 1936, for the purpose of selling real estate and "business opportunities." They rented a vacant store at 1731 West Seventh street, Los Angeles. Defendant furnished the business experience and Whiting the capital. Office furniture was installed on a lease contract by which most of the purchase price was to be paid at a future date. A stenographer was employed on a commission basis, her compensation to be 10 per cent. on all of the sales that should be consummated. During the next two months only two transactions were consummated, on one of which the commission was \$50 and on the other the commission was \$15. Whiting then withdrew from the partnership.

Upon the withdrawal of Whiting defendant inserted an advertisement in a Los Angeles newspaper under the head "Business Opportunities," by which a partner was sought. In answer to this advertisement Reshman went to the office of "Ideal Investment Company" and there defendant stated to him that he had sales rights for oil leases he expected to put upon the market and that he needed some one to look after the business in the office while he was absent; that the various types of businesses he sold were gas stations, restaurants, rooming houses, and "any little business that was offered for sale"; that the business had been in operation about two months and had cleared about \$1,200; that the secretary had made about \$120 on a commission basis of 10 per cent. Defendant showed Reshman a page from a loose-leaf book and stated that the sale there represented was recent and had

brought in between \$50 and \$75. All of these statements were false. Reshman showed his bank book to defendant, who offered him a partnership for the sum of \$500. Reshman later agreed to purchase an interest in the business and the two went to a bank where defendant insisted that the \$500 be in cash. Reshman objected to carrying \$500 in cash through the downtown district and defendant expressed his willingness to carry it, but Reshman replied that the money would not be turned over until the papers were signed and they had become partners. Reshman suggested that a certified check be obtained from the bank. This was done and the parties went to a lawyer's office where a partnership agreement was drawn and signed and the certified check was delivered by Reshman to defendant. At the office of the company Reshman was assigned a desk in the front part of the office, but there was no business other than one transaction which netted a commission of \$35 or \$50, of which Reshman received \$16.25. In about a month the furniture company removed the furniture. The next day defendant suggested to Reshman that they burn up their written agreement, since the partnership had ended with the return of the furniture. At the time Reshman purchased the interest in the business defendant did not inform him that he had previously had a partner.

Defendant contends that if any crime is shown by the evidence it is the offense of obtaining property by false pretenses and that no corroboration was offered of the testimony of the complaining witness; that the trial court erred in failing to instruct the jury that the pretenses must be proven by the testimony of two witnesses or by that of one witness and corroborating circumstances, as provided by section 1110 of the Penal Code; and that the trial court erred in instructing the jury as to the elements of larceny by trick and device in view of the fact that the evidence failed to show that the offense of larceny by trick and device was committed.

[1] The distinction between the offenses of larceny and of obtaining money by false pretenses depends upon the intention with which the owner of the property parted with it to the person taking it. "In larceny, the owner of the thing has

no intention to part with his property therein to the person taking it, although he may intend to part with the possession. In false pretenses, the owner does intend to part with his property in the money or chattel, but it is obtained from him by fraud." *People v. Delbos*, 146 Cal. 734, 736, 81 P. 131. The only reasonable view that may be taken of the evidence presented is that Reshman intended to pass title to his money to defendant. He made an outright purchase of an interest in the business, such as it was. He took great care to see that neither the cash nor the check was turned over to defendant until the partnership papers had been signed and he had become a partner.

[2-4] Since the offense shown by the evidence is that of obtaining property by false pretenses, it was incumbent upon the prosecution, in the absence of proof that the pretenses, or some note or memorandum thereof, were in writing, to prove the pretenses by the testimony of two witnesses or that of one witness and corroborating circumstances. The prosecution did not establish the facts as required by section 1110 of the Penal Code in order to justify a conviction. The evidence as to the making of the false representations came solely from the testimony of Reshman. The respondent argues that corroboration may be found in the testimony of the witness Ott, who stated that defendant had attempted to interest him in buying a partnership with one Jess Davie and that defendant had stated to the witness that during the preceding month he had made \$1,200, of which he had paid 10 per cent. to his secretary. It is apparent that the witness Ott was testifying about a transaction entirely different from the one which is the subject of the present action. His testimony does not satisfy the requirement of the Code.

[5,6] The trial court failed to instruct the jury that the defendant could not be convicted of the offense of obtaining property by false pretenses unless the pretenses be proven by the testimony of two witnesses or by corroborating circumstances. The failure to so instruct the jury constitutes reversible error. Although it is not the duty of the court to give instructions to the jury upon specific points developed by the evidence unless such instructions are requested, it is nevertheless the duty of the court in criminal actions to give to the jury instructions on the general principles of law pertaining to the case on trial. *People v. Scofield*, 203 Cal. 703, 265 P. 914. In *People v. Heddens*, 12 Cal.App.2d 245, 55 P.2d 230, the trial court failed to instruct the jury that the testimony of an accomplice must be corroborated in order to sustain a conviction, as required by section 1111 of the Penal Code. The defendant did not ask for instructions on the subject, but the judgment of conviction was reversed on account of the failure of the court to give the proper instruction on its own motion. The present case presents a parallel situation. In *People v. Carter*, 131 Cal.App. 177, 21 P.2d 129, 132, a judgment of conviction was reversed for failure of the trial court to instruct the jury concerning the requirements of section 1110 of the Penal Code. The court referred to the legal principle involved as a "thoroughly seasoned rule" which "should not lightly be cast aside" and held that the provisions of section 4½ of article 6 of the Constitution did not justify an affirmance of the judgment.

The judgment and order denying a new trial are reversed and a new trial is ordered.

We concur: CRAIL, P. J.; McCOMB, J.

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SECOND SERIES

10 Cal.2d 603

BARKER BROS., Inc., v. CITY OF LOS ANGELES.

L. A. 15483.

Supreme Court of California.

Feb. 3, 1938.

Rehearing Denied Feb. 24, 1938.

1. Licenses $\hookrightarrow$ 15(1)

The word "or" within ordinance imposing license tax on any "department store or any store where a variety of goods, wares and merchandise are offered for sale from several departments or sections" was used as a disjunctive marking an alternative generally corresponding to "either" as "either this or that," bringing within scope of ordinance both department stores and those which may not be commonly known as such but offer their goods for sale from several departments or sections.

[Ed. Note.—For other definitions of "Or," see Words & Phrases.]

2. Taxation $\hookrightarrow$ 42(1)

A wide discretion is given to legislative bodies in the imposition of taxes, and the right to classify for such purposes is of wide range and flexibility.

3. Constitutional law $\hookrightarrow$ 229(1)

The equal protection clause requires that classification in the exertion of taxing power be not arbitrary, but based on real and substantial difference having a reasonable relation to the subject of the particular legislation. Const.U.S. Amend. 14; Const.Cal. art. 1.

4. Taxation $\hookrightarrow$ 42(1)

The state, though it may classify broadly the subjects of taxation, must do so on a rational basis so that all persons similarly circumstanced shall be treated alike.

5. Constitutional law $\hookrightarrow$ 230(2)Licenses $\hookrightarrow$ 7(3)

It is not essential to the validity of a general occupational license tax ordinance that the legislative body include every kind of a business or occupation within its provisions if the discrimination is based upon some reasonable distinction.

6. Constitutional law $\hookrightarrow$ 230(1)Licenses $\hookrightarrow$ 7(3)

It is essential to the validity of a general occupational license tax ordinance that the classification be defined with reasonable certainty.

7. Constitutional law $\hookrightarrow$ 230(3)Licenses $\hookrightarrow$ 7(2)

An ordinance imposing license tax on "any store which is commonly known as a department store or any store where a variety of goods, wares and merchandise are offered for sale from several departments or sections" without defining term "commonly known as a department store," so that it could be determined whether a particular business was included was too indefinite to be used as a classification for the purpose of taxation. Const.U.S. Amend. 14; Const. Cal. art. 1.

8. Constitutional law $\hookrightarrow$ 230(3)Licenses $\hookrightarrow$ 7(3)

An ordinance imposing license tax on "any store commonly known as a department store or any store where a variety of goods, wares and merchandise are offered for sale from several departments or sections," which would permit imposition of tax upon one who systematically arranged stock and would allow one who kept same type of stock in disorder to go untaxed, was based upon no reasonable distinction warranting tax on one and not the other. Const.U.S. Amend. 14; Const.Cal. art. 1.

9. Statutes $\hookrightarrow$ 245

The laws imposing taxes are in invitum and are to be strictly construed in favor of the taxpayer.

10. Constitutional law $\hookrightarrow$ 230(3)Licenses $\hookrightarrow$ 7(3)

An ordinance imposing license tax on "any store commonly known as a department store or any store where a variety of goods, wares and merchandise are offered for sale from several departments or sections," without showing that it was based upon reasonable factors which would furnish a reasonable ground for classification of such stores as a basis for taxation, was invalid as not being sufficiently definitive. Const.U.S. Amend. 14; Const.Cal. art. 1.

11. Licenses $\hookrightarrow$ 15(1)

An ordinance imposing license tax upon stores selling particular articles or kinds of merchandise enumerated based upon amount of gross sales was applicable to all stores selling particular articles or kinds of merchandise enumerated.

12. Commerce $\hookrightarrow$ 64

An ordinance imposing license tax on stores selling particular kinds of merchandise enumerated, based upon gross sales, was not invalid as placing a direct burden on in-

terstate commerce. Const.U.S. art. 1, § 8, cl. 3.

13. Licenses

A license tax paid under protest under an ordinance giving municipality right to sue for the license tax and also making each day's violation of payment a misdemeanor could be recovered, since payment was not "voluntary."

[Ed. Note.—For other definitions of "Voluntary Payment," see Words & Phrases.]

SHENK and LANGDON, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action to recover amount of tax paid under general occupational license tax ordinance by Barker Bros., Inc., a corporation, against the City of Los Angeles, a municipal corporation. Judgment for the defendant, and plaintiff appeals.

Reversed and remanded.

Prior opinion, 67 P.2d 729.

Rehearing denied; **LANGDON and SHENK, JJ., dissenting.**

Musick & Burrell, Elvon Musick, and Howard Burrell, all of Los Angeles, E. Perry Churchill, of Santa Paula, and Gwyn S. Redwine and Clayton Straub, both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and C. P. Harrell, Jr., William Christenson, and Bourke Jones, Deputy City Attys., all of Los Angeles, for respondent.

EDMONDS, Justice.

In September, 1934, agents of the City of Los Angeles informed Barker Bros., the owner of a large retail establishment, that, pursuant to the terms of a general occupational license tax ordinance, it must procure a license for carrying on its business for the six-month period ending at the close of the following December. Thereafter Barker Bros. procured the license by paying the amount of tax demanded, accompanying the payment with a written notice of protest upon the ground that it was not subject to the ordinance. It later brought suit to recover the amount of tax paid and has appealed from a judgment in favor of the city.

Under the terms of the ordinance in controversy "it shall be unlawful for any person * * * to commence or carry on any trade, calling, profession or occupation in this ordinance specified, in the City of Los Angeles, without first having procured a license so to do. * * *" Section 128 (c) requires a license fee from "every person, firm or corporation conducting or carrying on any store which is commonly known as a department store or any store where a variety of goods, wares and merchandise are arranged in or offered for sale from several departments or sections." The gross annual receipts of such a store determines the amount of the fee which must be paid. The city claims that the business of Barker Bros. comes within the provisions of this section. The appellant contends that it does not conduct a store of the kind described, and also that the ordinance, in so far as it relates to department stores or stores selling merchandise from departments, is unconstitutional for several different reasons. It is also said to violate the commerce clause of the Federal Constitution. Article 1, § 8, cl. 3.

The trial court found "that at all times during the year 1934, the plaintiff was engaged in the business of conducting, managing and carrying on a department store where a large variety of goods, wares and merchandise were sold and offered for sale from approximately thirty-nine different departments." The evidence upon which this finding was made is practically undisputed. It shows that in 1934 the principal business of the appellant consisted in the sale of furniture and house furnishings, but that it also sold jewelry and silverware, children's wear, china and glassware, blankets, pianos, kitchenware, small electric equipment, candy, toys, lingerie, hosiery, and many other kinds of merchandise. However, at least 93 per cent., in amount, of its total gross sales for the year were of household furniture or furnishings, and the appellant contends that in only two of its departments were goods sold which cannot be classed as such.

[1] The ordinance in controversy requires a license for any department store or any store where a variety of goods, wares, and merchandise are offered for sale from several departments or sections. The word "or" is ordinarily used as a

disjunctive "that marks an alternative generally corresponding to 'either' as 'either this or that.'" 46 C.J. 1124, § 1; *Dodd v. Independent Stove & Furnace Co.*, 330 Mo. 662, 51 S.W.2d 114. As so understood, the ordinance brings within the scope of its provisions both department stores and those which may not be "commonly known" as such but offer their goods for sale from several departments or sections. It is therefore necessary to consider whether either of these classifications may be made by the city without violating constitutional principles.

[2-4] Wide discretion is given to legislative bodies in the imposition of taxes, and the right to classify for such purposes is of wide range and flexibility. *Buene-man v. City of Santa Barbara*, Cal.Sup., 65 P.2d 884, 109 A.L.R. 895: "The equal protection clause does not detract from the right of the state justly to exert its taxing power or prevent it from adjusting its legislation to differences in situation or forbid classification in that connection, 'but it does require that the classification be not arbitrary, but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation.' *Power Co. v. Saunders*, 274 U.S. 490, 493, 47 S.Ct. 678, (71 L.Ed. 1165)." *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 400, 48 S.Ct. 553, 554, 72 L.Ed. 927; *Stebbins v. Riley*, 268 U.S. 137, 45 S.Ct. 424, 69 L.Ed. 884, 44 A.L.R. 1454; *Royster Guano Co. v. Virginia*, 253 U.S. 412, 40 S.Ct. 560, 64 L.Ed. 989. While the state may classify broadly the subjects of taxation, it must do so on a rational basis so that all persons similarly circumstanced shall be treated alike. *Louisville Gas Co. v. Coleman*, 277 U.S. 32, 48 S.Ct. 423, 72 L.Ed. 770; *Ohio Oil Co. v. Conway*, 281 U.S. 146, 50 S.Ct. 310, 74 L.Ed. 775. These fundamental principles are expressly recognized in the charter of the City of Los Angeles, which provides: "No discrimination in the amount of license tax shall be made between persons engaged in the same business other than by proportioning the tax to the amount of business done." Article 1, § 3.

[5-7] It is not necessary for the validity of a general occupational license tax ordinances that the legislative body include every kind of a business or occupation within its provisions if the discrimination is based upon some reasonable dis-

inction. *State Board of Tax Commissioners v. Jackson*, 283 U.S. 527, 51 S.Ct. 540, 542, 75 L.Ed. 1248, 73 A.L.R. 1464, 75 A.L.R. 1536; *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232, 10 S.Ct. 533, 33 L.Ed. 892. It is equally important that the classification be defined with reasonable certainty. But in the ordinance here considered the lawmakers have given no definition of a department store by which one may know whether a particular business is included within the terms of the ordinance. How "commonly" must a department store be known as such to subject it to a tax? Is the test whether a store sells ready-to-wear garments and yardage, as some witnesses stated? Or does the classification depend upon the number of departments? Does it rest upon the opinion of other merchants in the community, or of customers of the store, or of people generally? Or, as the appellant claims, is such a store one which handles a general line of merchandise without specializing in any particular kind? The term "commonly known as a department store" cannot be applied with any certainty to a particular business and is too indefinite to be used as a classification for the purpose of taxation.

[8,9] The ordinance requires no license for the sale of many kinds of merchandise handled by the appellant in 1934 except as these articles might be included among those sold by a store "where a variety of goods * * * are arranged in or offered for sale from several departments or sections." Furniture, jewelry, children's wear, china ware, and house-sold goods may be mentioned as examples. If the owner of the furniture store keeps his stock in helter-skelter disorder, he requires no license; if he arranges it by "departments or sections," he must pay a tax. If he sells a "variety" of household goods or china ware from a general stock, he escapes taxation; if, however, he offers it for sale grouped according to kind, he is then carrying on a business subject to the ordinance. Certainly such classification, so far as the evidence presented in this case shows, is based upon no reasonable distinction. Nowadays, almost every store presents its merchandise in departments or sections, and an owner who uses these modern merchandising methods of arrangement and display may not be required to pay a tax while his less progressive neighbor, selling the same ar-

titles, is allowed to go on his unsystematic way without being subjected to it. Laws imposing taxes are in invitum and are to be strictly construed in favor of the taxpayer. *Uhl v. Badaracco*, 199 Cal. 270, 248 P. 917; *In re Dees*, 46 Cal.App. 656, 189 P. 1050; *U. S. v. Merriam*, 263 U.S. 179, 44 S.Ct. 69, 68 L.Ed. 240, 29 A.L.R. 1547; *Gould v. Gould*, 245 U.S. 151, 38 S.Ct. 53, 62 L.Ed. 211.

[10] The City of Los Angeles relies strongly upon State Board of Tax Commissioners v. Jackson, supra, and *Liggett Co. v. Lee*, 288 U.S. 517, 53 S.Ct. 481, 484, 77 L.Ed. 929, 85 A.L.R. 699, to sustain the validity of the ordinance. In the former case the court sustained a statute taxing chain stores, but it pointed out that "the appellants produced evidence to prove that there are many points of difference between chain stores and independently owned units" and enumerated them. It also said: "The record shows that the chain store has many features and advantages which definitely distinguish it from the individual store dealing in the same commodities." In the *Liggett Case* the court held that a statute requiring a license upon retail stores and fixing a tax based upon the number of stores in one ownership was invalid because there was no reasonable basis for such classification. In referring to the decision in the *Jackson Case* the court said that it was based "upon the ultimate fact of common knowledge, illustrated and emphasized by the evidence, that the conduct of a chain of stores constitutes a form and method of merchandising quite apart from that adapted to the practice of the ordinary individually operated small store or department store." In this case the City of Los Angeles made no attempt to show that there is any fundamental difference between a department store's method of doing business and that followed by an ordinary retail store, a furniture store for example. There may be such a distinction as would support a separate classification of such stores as the basis for taxation. But there is neither adequate definition of the classification in section 128 (c) of the ordinance in question, nor evidence that it is based upon any factors which would furnish a reasonable ground for it. For these reasons, section 128 (c) of the ordinance violates the provisions of the Fourteenth article of the Amendments to the Constitution of the United

States and also article 1 of the Constitution of California.

[11, 12] However, the appellant cannot escape payment of the license tax imposed upon stores selling the particular articles or kinds of merchandise enumerated in the ordinance. Its liability for a tax will depend upon whether it sold such merchandise, and must be based upon the gross amount received therefrom. But in any computation of the amount of its gross sales the appellant may not make any deduction for goods shipped out of the state of California. The ordinance lays a tax upon the occupation or business, not upon particular sales. The volume of gross business fixes the amount of tax to be paid. Such a tax places no direct burden on commerce in the goods sold. All taxation has some incidental and indirect effect upon interstate commerce, but an excise tax which has only such remote effect is valid. *American Mfg. Co. v. City of St. Louis*, 250 U.S. 459, 39 S.Ct. 522, 63 L.Ed. 1084. "The turning point of these decisions is whether in its incidence the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely, so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it." *Hump Hairpin Co. v. Emmerson*, 258 U.S. 290, 295, 42 S.Ct. 305, 307, 66 L.Ed. 622.

[13] Under the circumstances shown in this case the payment made by the appellant was not a voluntary one. The ordinance gives the city the right to sue for the license tax and also makes each day's violation of it a misdemeanor. Payment of the amount of the tax demanded by the agents of the city was therefore involuntary and made under pressure of the law's duress. *Vitale v. City of Los Angeles*, 13 Cal.App.2d 704, 57 P.2d 993; *Home Tel., etc., Co. v. City of Los Angeles*, 40 Cal.App. 492, 181 P. 100.

The judgment is reversed and the cause remanded to the superior court for proceedings consistent with this opinion.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; NOURSE, Justice pro tem.

We dissent: SHENK, J.; LANGDON, J.

REARDON v. RILEY et al.
S. F. 15941.**Supreme Court of California.****Jan. 31, 1938.**

Rehearing Denied Feb. 24, 1938.

1. Statutes $\Rightarrow$ 33

Items for specific purposes in appropriation for Department of Industrial Relations were items of "appropriation" subject to veto power of Governor, even though such items were included within general appropriation to Department of Industrial Relations. Const. art. 4, §§ 16, 34.

[Ed. Note.—For other definitions of "Appropriate; Appropriation," see Words & Phrases.]

2. Statutes $\Rightarrow$ 33

The Governor, who eliminated in appropriation for Department of Industrial Relations certain specific items, was not precluded from reducing the general appropriation for the department by an amount less than the aggregate of the eliminated specific items. Civ.Code, § 3541; Const. art. 4, §§ 16, 34.

3. Statutes $\Rightarrow$ 33

General appropriation to the Department of Industrial Relations, granted by Legislature to the department, was an itemized "appropriation" within constitutional veto power of Governor. Const. art. 4, §§ 16, 34.

4. Statutes $\Rightarrow$ 33

The Governor, who eliminated in appropriation for the Department of Industrial Relations items for specific purposes, had power to reduce general appropriation for the department by a lesser amount than the aggregate of the specific items eliminated and the department was entitled to the amount of the general appropriation thus reduced, upon Legislature's negative vote upon propositions to overrule the Governor's action. Const. art. 4, §§ 16, 34.

5. Statutes $\Rightarrow$ 33

The action of the Governor who eliminated items for specific purposes in appropriation for Department of Industrial Relations and reduced general appropriation for department by lesser amount than the aggregate of eliminated items did not improperly increase the appropriation without legislative action, nor constitute an unauthorized veto of conditional language used by Legislature in connection with specific and

included items of appropriation, where apparent legislative intention was to grant to department the total sum appropriated even if specific items were eliminated by Governor. Const. art. 4, §§ 16, 34; Civ.Code, § 3541.

6. Mandamus $\Rightarrow$ 172

The Supreme Court, which determined result of Governor's veto of certain items of appropriation for the Department of Industrial Relations in mandamus proceedings brought by director of the department, would not consider items of appropriation other than those made to such department, even though other items presented somewhat similar problems, since other items were not within the issues of the proceedings, and some of the parties most intimately interested therein were not before the court.

In Bank.

Original proceeding by Timothy A. Reardon, as director of the Department of Industrial Relations, against Harry B. Riley, as Comptroller of the state, and another for a writ of mandamus requiring the named respondent, as Comptroller of the state, to set up on books of his office the sum of \$1,397,185 to cover the expenditures of the Department of Industrial Relations, for the eighty-ninth and ninety-ninth fiscal years covering the period from July, 1937, to July, 1939, and for a similar writ requiring respondent Arlin E. Stockburger, as Director of the Department of Finance to approve the budget of the Department of Industrial Relations for the eighty-ninth fiscal year.

Peremptory writs issued as prayed.

Everett A. Corten, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for respondent Harry B. Riley.

Fred B. Wood, of San Francisco, and Arthur McHenry and Webb Shadle, both of Sacramento, for respondent Stockburger.

WASTE, Chief Justice.

The petitioner, as director of the Department of Industrial Relations of this state, seeks the issuance of a writ of mandamus directing and commanding the respondent Harry B. Riley, as controller of the state, to set up on the books of his office the sum of \$1,397,185 to cover the expenditures of the Department of Indus-

trial Relations for the 89th and 90th fiscal years, covering the period July, 1937, to July, 1939. Petitioner seeks a similar writ directing and commanding the respondent Arlin E. Stockburger, as director of the Department of Finance, to approve the budget of the Department of Industrial Relations for the 89th fiscal year, which budget has been framed upon the basis of the alleged appropriation of \$1,397,185 for said biennium.

Respondent Stockburger, as director of finance, admits all of the allegations of the petition and evinces a willingness to approve the proposed fiscal year budget, but his desire so to do is frustrated by reason of the failure and refusal of the respondent Riley, as controller, to set up on his books more than \$1,277,185 to cover the expenditures of the Department of Industrial Relations for the designated biennium, which amount is \$120,000 less than that alleged by petitioner to have been appropriated for the department.

The controversy as to the disputed \$120,000 had its inception in the following facts: It appears that pursuant to the provisions of section 34 of article 4 of the Constitution, the Governor submitted to the Fifty-second Legislature a budget, accompanied by an appropriation bill, covering the proposed biennium expenditures, among others, of the Department of Industrial Relations in the sum of \$1,297,185. As finally passed by the Legislature and submitted to the Governor for consideration, the budget or appropriation bill, so far as the Department of Industrial Relations is concerned, was amended by increasing its appropriation to \$1,625,185, it being specifically provided that \$328,000 and \$20,000, respectively, of the sum so appropriated should be expended as therein designated. Pursuant to the power vested in him by sections 16 and 34 of article 4 of the Constitution, the Governor signed the appropriation bill and at the time of signing appended thereto a statement of the items therein contained to which he objected, together with his reasons therefor. In paragraph "2" of his statement of objections the Governor, with reference to the item for the Department of Industrial Relations (No. 78 in the appropriation bill), stated, "I object to and eliminate" the specific and included items of \$328,000 and \$20,000 "for the reason that I consider the department of industrial relations and the department of finance bet-

ter equipped to make such allocations, and vested with ample authority to provide through fiscal year budgets, for the needs, when known, of such functions." In paragraph "3" of his statement of objections, the Governor went on to state that he objected to the item appropriating to the Department of Industrial Relations \$1,625,185 (which general item, as shown, included the "eliminated" specific items of \$328,000 and \$20,000) and did "reduce the same" to \$1,397,185, the amount to which petitioner alleges his department is entitled for the biennium, "for the reason that \$1,397,185 is considered sufficient to permit an expanded program of activities of this department for the next biennium. This amended item is * * * \$100,000.00 more than originally recommended in this budget." Thereafter the assembly reconsidered the budget and appropriation bill taking up separately, but failing to override, the Governor's action in connection with the reduction of the \$1,625,185 item and the veto of the specific and included items of \$328,000 and \$20,000. It is our problem to here determine the effect of this action of the executive and legislative departments upon the appropriation for the Department of Industrial Relations.

Three possible results suggest themselves, viz.: (1) That the action of the Governor was a nullity, leaving all three items (\$328,000, \$20,000, and \$1,625,185) as they were before the Governor attempted to veto the first two and reduce the third by a lesser amount than the aggregate of the "eliminated" items; or (2) that the action of the Governor reduced the sum of \$1,625,185 originally fixed by the Legislature, by the aggregate of the "eliminated" items (\$328,000 plus \$20,000 or \$348,000), leaving the sum of \$1,277,185—the total amount claimed by the respondent controller to be available to the department of industrial relations; or (3) that the action of the Governor "eliminated" the specific and included items of \$328,000 and \$20,000 but did not affect the general appropriation of \$1,625,185 for said department, which latter item was affected only by the express reduction thereof by the Governor to \$1,397,185—the amount claimed by petitioner for his department and conceded by the respondent director of finance as being available therefor.

[1] The decision in *Wood v. Riley*, 192 Cal. 293, 219 P. 966, excludes the result

first above stated. All the parties hereto concede that the cited case is authority for the proposition that the specific items of \$328,000 and \$20,000 are items of "appropriation" and subject to the veto power of the Governor under sections 16 and 34 of article 4 of the Constitution, even though included within the general appropriation of \$1,625,185 to the Department of Industrial Relations.

[2] We are not inclined to accept the second result above indicated, and, contended for by the respondent controller, as the applicable solution of this proceeding. In support thereof he contends that by the "elimination" of the specific and included items of \$328,000 and \$20,000, respectively, the Governor ipso facto reduced the general or gross appropriation to the Department of Industrial Relations by the aggregate of said "eliminated" specific items, or to \$1,277,185, and that the Governor could not then increase the "reduced" general appropriation by \$120,000 (the amount here in dispute), or to \$1,397,185, without prior legislative action. The result contended for by the respondent controller is required neither by law nor reason. It stultifies and improperly restricts the power vested in the Governor by sections 16 and 34 of article 4 of the Constitution, which sections authorize the Governor to "reduce or eliminate any one or more items of appropriation of money while approving other portions of the bill." In other words, the second result above suggested, and here contended for by the respondent controller, would permit the Governor to "reduce or eliminate" the specific and included items of further "appropriation," but would preclude him from "approving," as authorized, such other portion of the bill as contained the general "appropriation" for the department and would likewise preclude the Governor from "reducing," as was his obvious intention here, the general appropriation by an amount less than the aggregate of the "eliminated" specific and included items. Such a result is not to be favored. As declared in section 3541 of the Civil Code, "an interpretation which gives effect is preferred to one which makes void."

[3,4] On the other hand, the third result above suggested gives full effect to the intent of the Legislature without unduly curtailing the power granted to the Governor by the cited sections of the Con-

stitution. As already shown, the specific and included items of \$328,000 and \$20,000 are items of "appropriation" within and subject to the constitutional veto power of the Governor. It cannot be denied that the larger and inclusive item of \$1,625,185, originally granted by the Legislature to the Department of Industrial Relations, is likewise an item of "appropriation" (*Riley v. Johnson*, 219 Cal. 513, 27 P.2d 760, 92 A.L.R. 1292), and, therefore, is within the constitutional veto power of the Governor. Consequently, and as in the case of specific and included items of further appropriation, the Governor is free to "reduce" the general and inclusive item of appropriation as in his judgment appears proper. This he did in the instant case by reducing the general appropriation to \$1,397,185. Obviously, it was not his intention that the general appropriation should thereby be reduced to \$1,277,185, as urged by the respondent controller. That it was the declared legislative intention to appropriate to the Department of Industrial Relations \$1,625,185 (prior to the Governor's reduction thereof), even though the specific and included items of further appropriation should be "eliminated" by the Governor, appears reasonably certain from the subsequent action of the assembly when, upon reconsideration, it separately considered and negatively voted upon the proposition of overriding the Governor's action in "eliminating" the two specific and included items of further appropriation (which that body had added) and in "reducing" the general and inclusive item of appropriation. Had it been the legislative intention to grant to the Department of Industrial Relations the sum of \$1,625,185 only in the event the specific and included items of \$328,000 and \$20,000 were not "eliminated" by the Governor, the subsequent vote upon the proposition of overriding his reduction of the larger appropriation would have been unnecessary following the negative vote on the two propositions to override his veto or "elimination" of the two specific and included items. In other words, we conclude that it was the original legislative intent to appropriate \$1,625,185 to the department regardless of the subsequent fate of the specific and included items of further appropriation and that the Governor, within the power conferred upon him by the Constitution, could properly, in his judgment, reduce the general appropriation in the manner above indicated.

[5] This action upon his part did not, in our opinion, thereby improperly increase an appropriation without legislative action, nor did it constitute an unauthorized veto of conditional or provisional language used in connection with the specific and included items of appropriation. It was an "elimination" of the specific and included items and a reduction of the general and inclusive item of appropriation. Such a conclusion appears to effectuate the intent of the Legislature without depriving the Governor of the full effect of the veto power granted him.

A somewhat analogous result was reached with respect to special fund moneys, as distinguished from general fund moneys with which we are here concerned, when in *Board of Fish and Game Com'rs v. Riley*, 194 Cal. 37, 43-49, 227 P. 775, 780, it was held, in effect, that the reduction by the Governor of a specific and included budget appropriation for the fish and game commission did not abrogate or affect the continuing appropriation to the commission of all the moneys deposited in the fish and game fund and that the subsequent authorization of an expenditure greater than that provided for in the specific, included and reduced budget appropriation did not encroach upon the legislative function "since its effect is not to make an appropriation, but is merely to render available, to the extent of its allowance, an appropriation already made." Such, by analogy, is our reasoning and conclusion herein.

It appears from the brief of the respondent director of finance, and is conceded by the respondent controller, that the predecessor in office of the respondent controller, under analogous circumstances, caused by the upholding in *Wood v. Riley*, supra, of the Governor's veto of a specific and included item of appropriation of 1 per cent. of the fund generally appropriated by the Budget Act of 1923 for teachers' colleges, applied to the situation a practical construction, consistent with our reasoning and conclusion herein, and set up on his books the entire 100 per cent. of the appropriation notwithstanding the veto of the 1 per cent.

[6] In conclusion, we do not find it necessary or proper to here concern ourselves with items of appropriation other than those made to the Department of Industrial Relations, herein represented by its petitioning director. Such other items,

though perhaps presenting somewhat similar problems, are not within the issues of this proceeding and some of the parties most intimately interested therein are not now before the court.

Let peremptory writs issue as prayed.

We concur: SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; EDMONDS, J.; HOUSER, J.



10 Cal.2d 538

FENNESSEY et al. v. PACIFIC GAS & ELECTRIC CO. et al.

S. F. 15893.

Supreme Court of California.

Jan. 31, 1938.

Rehearing Denied Feb. 24, 1938.

1. New trial ☞3

A motion for new trial as to defendants against whom a verdict has not been returned will not lie. Code Civ.Proc. § 656.

2. Trial ☞328

Ordinarily, a verdict against one of several defendants is not a verdict in favor of those not mentioned, but the verdict may be construed with reference to the instructions pursuant to which it was rendered.

3. Trial ☞339(1)

The court may send the jury back to pass upon issues not determined as to certain of several defendants. Code Civ.Proc. § 619.

4. Trial ☞328

In action against three defendants, where forms of verdict supplied jury included one in favor of plaintiffs against all the defendants, another in favor of the plaintiff and against the third defendant alone, and a third form in favor of the defendants, and court instructed jury that if action upon which liability of first two defendants depended was not a proximate cause, then verdict should be alone against the third defendant, a verdict against the third defendant was equivalent to a verdict in favor of the first two defendants, particularly where jury, in response to a question by court, stated that by use of the form employed no verdict was intended against first two defendants.

5. Trial Ⓒ328

In action against three defendants, where verdict against third defendant when viewed in the light of instructions given with reference to forms of verdict supplied was equivalent to a verdict in favor of first two defendants, although the first two were not mentioned in the verdict returned, a motion for new trial rather than for mistrial as to the first two defendants was authorized. Code Civ.Proc. §§ 656, 659.

6. New trial Ⓒ137

A notice of intention to move for new trial in event that verdict rendered was construed as a verdict in favor of defendants who were not mentioned in verdict was sufficient notice to support order granting new trial.

7. Appeal and error Ⓒ933(4)

Insufficiency of the evidence could not be considered on appeal as a ground for new trial, where order therefor did not specify such ground. Code Civ.Proc. § 657.

8. New trial Ⓒ39

Errors in instruction constitute errors in law for which a new trial may be granted.

9. Trial Ⓒ295(1)

Whether misleading and confusing implications in instructions were cured by charge as a whole was a matter for trial court's discretion.

10. New trial Ⓒ6

The granting of a new trial rests largely in the trial court's discretion.

11. Appeal and error Ⓒ977(1)

The trial court's action in granting or refusing a new trial will not be disturbed on appeal, in the absence of manifest and unmistakable abuse of discretion.

12. Appeal and error Ⓒ978(1)

The trial judge's action in granting a new trial because of errors in instructions as to proximate cause would not be disturbed on appeal.

In Bank.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Irene Fennessey and another against the Pacific Gas & Electric Company, Thomas Foley, and another. From an order granting plaintiff's motion for a retrial and a new trial, and denying the named

defendants' motion for entry of judgment in their favor, the named defendants appeal.

Order granting retrial reversed; order granting new trial as to the named defendants affirmed; order refusing to direct entry of judgment in favor of named defendants affirmed.

Prior opinion, 68 P.2d 401.

Thomas J. Straub, W. H. Spaulding, and Clinton F. Stanley, all of San Francisco, for appellants Foley and Pacific Gas & Electric Co.

John J. Taaffe, P. J. Murphy, and George B. Harris, all of San Francisco, for respondents.

SEAWELL, Justice.

Defendants Pacific Gas & Electric Company and Thomas Foley appeal from an order which granted plaintiffs' motion for a retrial and plaintiffs' motion for a new trial, and which denied defendants' motion for entry of a certain form of judgment in their favor.

Plaintiffs Irene Fennessey and William J. Fennessey, her husband, sued for damages received by Irene Fennessey when she was struck by an automobile operated as a jitney bus by defendant George L. Manecis. At the time of the accident said plaintiff was in or near a safety zone on Market street, in the city of San Francisco, at the southwest corner of Market and Tenth streets. Defendant Thomas Foley, an employee of the defendant Pacific Gas & Electric Company, had parked a company truck in the space between the south curb and said safety zone near a pole of said company. By reason of the presence of this truck Manecis drove to the left of the safety zone.

The parking of the truck between the safety zone and the curb was a violation of state law and municipal ordinance, section 138, California Vehicle Act, St.1923, p. 562, as amended by St.1931, p. 2129, in force at the time of accident September 22, 1934; now section 586, Vehicle Code, St.1935, p. 191; art. 5, § 35, San Francisco Traffic Ordinance, unless it was "engaged in the necessary performance of emergency duties." Section 8, art. 7, Traffic Ordinance. Foley testified that he was upon the working tower of the truck at the time of the accident. There was testimony of a disinterested witness that he was not upon said tower. Defendant Manecis testified that after the accident he went in search of Foley and could not locate him for a time. Another municipal ordinance provides that it shall be unlaw-

ful to drive to the left of a safety zone on Market street from the Embarcadero to Van Ness avenue. Tenth street is within these limits. There was testimony that there was insufficient space to drive between the truck and the safety zone.

Defendant Manecis defaulted. One of the contentions of defendants Pacific Gas & Electric Company and Foley was that the negligent manner in which Manecis operated the automobile after he was in the area to the left of the safety zone was the sole proximate cause of the accident. The jury returned a verdict against defendant Manecis and in favor of plaintiff for \$15,000 damages. Said verdict makes no mention of the other defendants. The judgment entered by the clerk follows the verdict and likewise contains no reference to the other defendants, appellants herein.

Thereafter, appellants filed notice of a motion for an order directing the clerk to enter judgment in their favor. The plaintiffs filed notice of a motion for a retrial as to said appellants on the ground that the jury had failed to return a verdict either for or against them. Plaintiffs also filed a notice of intention to move for a new trial on usual statutory grounds in the event it should be held that the verdict and judgment were in favor of said defendants. The court granted plaintiffs' motions, and denied defendants' motion.

[1] It is necessary to determine whether a verdict has been returned in favor of the appealing defendants, since if there was a failure to find on the issue as to them a motion for new trial did not lie. Section 656, Code Civ.Proc.; *Vitimin Milling Corporation v. Superior Court*, 1 Cal.2d 116, 33 P. 2d 1016.

[2] Ordinarily, a verdict against one of several defendants is not a verdict in favor of those not mentioned. *Benson v. Southern P. Co.*, 177 Cal. 777, 171 P. 948; *Rankin v. Central Pac. R. Co.*, 73 Cal. 93, 15 P. 57; *Lloyd v. Boulevard Express*, 79 Cal.App. 406, 249 P. 837. But this rule is subject to the qualification that a verdict may be construed with reference to the instructions pursuant to which it was rendered. *Snodgrass v. Hand*, 220 Cal. 446, 31 P.2d 198; *Crain v. Sumida*, 59 Cal.App. 590, 211 P. 479; *Chesapeake & O. Ry. Co. v. Booth*, 149 Ky. 245, 148 S.W. 61; *Pittsburg Ry. Co. v. Darlington's Adm'r*, 129 Ky. 266, 111 S.W. 360; *Durst v. Southern Ry. Co.*, 161 S.C. 498, 159 S.E. 844; 27 R.C.L. 859; 64 C.J. 1066.

In instructing the jury in the case herein, the court said:

"There are three forms of verdict: one in favor of the plaintiffs and against the defendants Manecis, Foley and Pacific Gas and Electric Company; another form of verdict in favor of the plaintiffs and *against Manecis alone*; and a third form of verdict in favor of the defendants.

"Now, as I have already told you, in the event that you find against Foley, that will mean also a verdict against the P. G. & E.; but in the event that you find Manecis alone was guilty of negligence, *and that the action of Foley and the parked truck was not a proximate cause*, then your verdict should be *alone against Manecis*. The other form of verdict, as I said, is in favor of the defendants." (Italics ours.)

The court plainly intended to submit to the jury all of the several forms of verdict which they might return. A verdict against Foley and the Pacific Gas & Electric Company, excluding Manecis, was not submitted for the reason that Manecis had defaulted. We think it too plain to be questioned that the court clearly and unequivocally told the jury that if they wished to find against Manecis alone, and in favor of the other defendants, they should return a verdict against Manecis alone. In the event the jury found that the parking of the truck was not a proximate cause, in which event Foley and the Pacific Gas & Electric Company were entitled to a judgment in their favor, the jury was to use the form of verdict against Manecis alone.

After the jury had returned with its verdict and the foreman had handed it to the court, the court said:

"Now, ladies and gentlemen of the jury, I did not give you a verdict in favor of the defendants—certain defendants. Do I understand correctly that by this form of verdict you intended to bring in no verdict against either Foley or the Pacific Gas & Electric Company?

"A juror: That is right.

"The Court: Is that correct?

"A juror: That is correct.

"The Court: Well, then, the jury will be excused until further notice from the presiding judge."

[3] It is apparent that the judge questioned the jury for the very purpose of ascertaining that no issues remained undetermined—that the jury's verdict passed upon the case with reference to the Pacific Gas &

Electric Company and Foley, as well as the defendant Manecis. If the answer of the jury had indicated that the case as to said defendants was undetermined, the court no doubt would have sent the jury back to pass upon the issues not determined. Section 619, Code Civ.Proc.

In *Crain v. Sumida*, 59 Cal.App. 590, 211 P. 479, 480, the jury used one of several blank forms of verdict with which it was supplied. The verdict as returned was as follows: "We, the jury, find for plaintiff against defendant H. Sumida, and fix plaintiff's damages for injury to his automobile in the sum of \$1,150. We, the jury, further find in favor of plaintiff for the loss of use of his automobile against said defendant H. Sumida, and fix plaintiff's damages therefor in the sum of \$300. And we further find in favor of defendant _____ that plaintiff take nothing." The jury had written in the name of H. Sumida in two places in the above form, leaving blank the third space. It was held that in the light of the instructions the concluding sentence of the verdict was in favor of K. Sumida, the other defendant.

Plaintiffs rely on *Keller v. Smith*, 130 Cal. App. 128, 19 P.2d 541, 542. There the court submitted to the jury several forms of verdict with names already filled in; the jury to indicate its decision by signing the appropriate form or forms. The jury signed a form returning a verdict against the defendant Dykes. Immediately below the verdict signed by the jury was the following form:

"We, the jury impanelled to try the above entitled cause, find for the defendants F. M. Keller, and Eunice Keller.

"_____"

[4] The jury failed to sign this form. It was held that a verdict had not been returned in favor of the Kellers. In the instant case, no form of verdict expressly providing for judgment for defendants Pacific Gas & Electric Company and Foley was submitted to the jury and left incomplete. In the circumstances herein the verdict, considered with reference to the instructions, is a verdict in favor of said defendants.

[5] It follows that the court erred in granting plaintiffs' motion for a retrial as to the appealing defendant on the ground that the case remained open as to them. Plaintiffs also moved for a new trial, including as grounds therefor errors of law. Since the jury had determined the case as to said de-

fendants, the motion for new trial lay. Sections 656, 659, Code Civ.Proc. The order herein appealed from by its terms grants not only plaintiffs' motion for retrial, but their motion for new trial. The intent of the judge no doubt was to protect plaintiffs in their right to a new trial as upon a verdict in favor of appellants in the event it should be held that he erred in determining that no verdict had been returned.

[6] In their notice of intention to move for a new trial plaintiffs stated their intent to make said motion only in the event that the verdict and judgment already entered "is to be or may be construed by the above entitled court, or assumed to be, a verdict in favor of" said defendants. The motions were submitted and acted on together. This notice is sufficient to support the order granted in the circumstances herein.

[7, 8] Insufficiency of the evidence cannot be considered as a ground for new trial since the order did not specify such ground. Section 657, Code Civ.Proc. Errors in instructions, however, constitute errors in law, one of the grounds of motion herein, for which a new trial may be granted. Plaintiffs urge numerous errors in the instructions as to proximate cause. For example, the court instructed the jury, "Proximate * * * means the closest cause, the nearest cause that you can find, the cause, if we may say it that way, in closest proximity." This was erroneous. *Hyer v. Inter-Insurance Exchange*, 77 Cal.App. 343, 347, 246 P. 1055; 19 Cal.Jur. 559. The court also gave the following instruction: "I just want to bring out the fact that here is your chain of causation, and if anything comes in between A and D to put a new light on things or to change the movement of things, that is an intervening cause." Another instruction was as follows: "If you believe from the evidence that both defendants were negligent, and you further believe that the negligence of the defendant Manecis was an *independent intervening act* which was the efficient cause of the injury to plaintiff, then your verdict must be in favor of the Pacific Gas & Electric Company." (Italics ours.) Proximate causation, it has been held, is not always arrested by the intervention of an independent concurring cause. *Merrill v. Los Angeles Gas & Electric Co.*, 158 Cal. 499, 504, 111 P. 534, 31 L.R.A., N.S., 559, 139 Am.St.Rep. 134; *McKay v. Hedger*, 139 Cal.App. 266, 275, 34 P.2d 221.

[9-12] Whether misleading and confusing implications in these and other instruc-

tions were cured by the charge as a whole, was a matter for the discretion of the trial court. The granting or refusing of a new trial rests very largely in the discretion of the trial court, and its action will not be disturbed in the absence of a showing of manifest and unmistakable abuse of discretion. *Sheets v. Southern Pacific Co.*, 112 Cal. 509, 299 P. 71; *Thompson v. California Const. Co.*, 148 Cal. 35, 82 P. 367; *Manufacturers' Finance Corporation v. Pacific Wholesale Radio, Inc.*, 130 Cal.App. 239, 19 P.2d 1013; *Babcock v. Pacific Gas & Elec. Co.*, 120 Cal. App. 218, 7 P.2d 736; *Stoneburner v. Richfield Oil Co.*, 118 Cal.App. 449, 5 P.2d 436. The trial judge herein exercised his discretion in favor of plaintiffs. His order granting a new trial will not be disturbed on appeal.

The order granting a retrial as to appellants on the theory that no verdict had been returned for appellants is reversed. The order refusing to direct entry of a judgment expressly in favor of appellants is affirmed, since a new trial has been granted. The order granting respondents' motion for a new trial as to appellants is affirmed. Appellants shall bear costs.

We concur: WASTE, C. J., HOUSER, J.; CURTIS, J.; EDMONDS, J.; SHENK, J.



10 Cal.2d 545

**PACIFIC GAS & ELECTRIC CO. et al. v.
SUPERIOR COURT OF CALIFORNIA
IN AND FOR CITY AND COUNTY OF
SAN FRANCISCO et al.**

S. F. 15886.

Supreme Court of California.

Jan. 31, 1938.

Mandamus ⇐16(1)

Prohibition ⇐13

Judgment sustaining trial court's action in granting plaintiff's motion for a new trial as to two defendants in whose favor verdict was rendered by implication rendered moot issues raised by the defendants' petition for writ of mandate and writ of prohibition by which it was sought to require the trial

court to enter judgment expressly in favor of the defendants and to prohibit the court from retrying the case as to them.

In Bank.

Proceeding in mandamus and prohibition by the Pacific Gas & Electric Company and another, petitioners, against the Superior Court of the State of California in and for the City and County of San Francisco, Honorable C. J. Goodell, Judge thereof, and H. A. Van Der Zee, County Clerk of the City and County, as ex officio clerk of the court, to secure entry of judgment expressly in favor of petitioners in a case heard by that court.

Petition denied.

Thomas J. Straub, W. H. Spaulding, and Clinton F. Stanley, all of San Francisco, for petitioners.

PER CURIAM.

Petition for writ of mandate and writ of prohibition. After filing their petition for hearing in this court after decision by the District Court of Appeal in *Fennessey v. Pacific Gas & Electric Company*, S. F. No. 15893, 76 P.2d 104, in this court, petitioners Pacific Gas & Electric Company and Thomas Foley filed this application for writ of mandate and prohibition. Upon the granting of the petition for hearing in that case, the instant application was continued to be determined together with said case.

The prayer of the petition is that the trial court be directed to enter judgment expressly in favor of petitioners in the case involved in action S. F. No. 15893, and prohibited from retrying said case as to them. In the event this court should be of the view that the verdict in the light of the instructions was a decision in favor of petitioners, and that grounds for granting a new trial after decision did not exist, petitioners were in doubt as to whether they could secure the relief to which they deemed themselves entitled by the appeal taken by them, or whether the proper course was to apply for writ of mandate to direct the trial court to enter a judgment expressly in their favor. For the reasons stated in case S. F. No. 15893 this day filed, the questions raised by petitioners herein have become moot, since we have sustained the action of the trial court in granting a new trial after decision of the jury. The pe-

tioners are not now entitled to entry of a judgment expressly in their favor nor to restrain a second trial.

The petition for writ of mandate and writ of prohibition is denied.



10 Cal.2d 587

**MAYNES et al. v. ANGELES MESA
LAND CO.
L. A. 16059.**

Supreme Court of California.
Feb. 2, 1938.

1. Action ☞6

Parties whose tenancy was terminated by judgment awarding lessor possession of leased premises on stipulation in unlawful detainer action were not entitled to declaratory judgment determining their rights in lease.

2. Landlord and tenant ☞48(2)

Tenants remaining in undisturbed possession of leased premises during lessor's unlawful detainer suit showed no damage recoverable for lessor's alleged repudiation of lease before such suit.

3. Fraud ☞42

A complaint, not alleging that defendant's alleged promise to lease certain premises to plaintiffs was made with intention of deceiving them or without intention of performing it, stated no cause of action for fraud in making promise without intending to perform it.

4. Fraud ☞12

Mere failure to carry out a promise is not a tort.

5. Fraud ☞41

The elements of alleged fraud in making false promise must be alleged.

6. Fraud ☞47

A complaint, alleging that plaintiffs spent money to establish business on certain premises in reliance on defendant's promise to lease them to plaintiffs, but not that defendant's alleged fraud in failing to sign lease deprived plaintiffs of such business, nor how defendant's acts interfered with business of plaintiffs, who remained in possession of premises, or caused such ex-

penditures, was fatally defective in pleading damage.

7. Frauds, statute of ☞44(4), 150(1)

The statute of frauds barred action for breach of contract to lease premises to plaintiffs by repudiation thereof, if original oral negotiations constituted contract, and could be raised by demurrer to complaint.

8. Landlord and tenant ☞48(1)

A complaint, not alleging that written lease was actually entered into by parties to action against corporation for breach of contract to lease premises to plaintiffs, but disclosing theory that defendant falsely represented to plaintiffs that it had entered into lease, and not pleading plaintiffs' performance of conditions and covenants of lease, was so uncertain and defective as to warrant court in sustaining demurrer thereto, if action was for breach of written lease.

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by A. E. Maynes and another against the Angeles Mesa Land Company for declaration of plaintiffs' right to cancellation of lease, accounting, and recovery of damages for repudiation of lease, and fraud in failing to sign it. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Van Lee Hood, of Los Angeles, for appellants.

Robert R. Ashton, of Los Angeles, for respondents.

PER CURIAM.

This is an appeal by plaintiffs from a judgment for defendant in an action for declaratory relief and damages. A motion by defendant to dismiss the appeal was filed, and the cause thereafter placed on the ready for submission docket.

The lower court sustained a general and special demurrer to the first amended complaint, without leave to amend. On this appeal, the question is whether the complaint states a cause of action.

In substance, the complaint alleges that defendant owned real estate, and submitted a written proposal to plaintiffs to lease the same for three years, commencing November 1, 1934, the rental to be 25 per cent. of the gross receipts of plaintiffs' undertaking business; that plaintiffs executed and de-

livered the proposed lease to defendant, took possession and made payments thereunder until about November 21, 1935; that at this time defendant notified plaintiffs that defendant had never executed the lease and did not consider the same binding; that thereafter defendant served a 30-day notice to terminate plaintiffs' tenancy; that plaintiffs thereafter elected to treat this notice as a repudiation of the lease and are now willing to vacate but are unable to determine whether they were tenants under the lease or from month to month; that they have paid more than actually required to pay as rental; and that they are entitled to cancellation of the lease and an accounting. In another cause of action incorporating many of these prior allegations, they attempt to plead a cause of action for fraud, based upon the theory that defendant represented that it would lease the property and failed to do so.

[1,2] It appears from the complaint that subsequent to defendant's notice plaintiffs remained in undisturbed possession, and were still in the premises at the commencement of this action in April, 1936. In June, 1936, defendant brought an unlawful detainer action against plaintiffs and on stipulation secured judgment for possession, without damages or costs; and thereafter the premises were sold to a third person.

With the tenancy thus terminated by the prior judgment, there is no basis for a declaration of rights in the proposed lease; and since plaintiffs admittedly remained in undisturbed possession during the unlawful detainer suit, there is no showing of damage by reason of any alleged repudiation of the lease prior thereto. The only theory of recovery which requires consideration is that of fraud in failing to sign the lease.

[3-5] Plaintiffs have attempted to plead a cause of action for fraud consisting of the making of a promise without any intention of performing the same. The trial court deemed the pleading insufficient, and plaintiffs have failed to show any authority justifying reversal of its judgment.

In the first place, the complaint alleges representations by defendant that it would lease the premises to plaintiffs, in other words, a promise of future action; but it does not allege that the promise was made with the intention of deceiving plaintiffs, nor that the promise was made without the intention of performing it. The mere fail-

ure to carry out a promise is not a tort, and it is therefore essential, in pleading fraud consisting of a false promise, to allege the elements of fraud. See *Rheingans v. Smith*, 161 Cal. 362, 119 P. 494, Ann. Cas.1913B, 1140; *Ayers v. Southern Pac. R. Co.*, 173 Cal. 74, 79, 159 P. 144, L.R.A. 1917E, 949; *Jacobson v. Mead*, 12 Cal.App. 2d 75, 82, 55 P.2d 285, 1267. The complaint is wholly insufficient in this respect. It is perfectly consistent with its allegations to infer that defendant made the alleged promise with the full intention of performing the same, and hence without fraud.

[6] Nor have plaintiffs properly pleaded any damage resulting from the alleged fraud. The complaint shows that they spent money to establish a business, but there is no showing that defendant's alleged fraud deprived them of such business. They were not evicted from the premises but in fact remained in possession when they brought this action. The complaint fails to show how any acts of defendants interfered with their business or caused the expenditures in question. In short, even if fraud had been well pleaded, the complaint would still be fatally defective in its attempted pleading of damage, an essential element of the cause of action. See *Guterman v. Gally*, 131 Cal.App. 647, 650, 21 P.2d 1000; *Barron Estate Co. v. Woodruff Co.*, 163 Cal. 561, 126 P. 351, 42 L.R.A., N.S., 125.

[7,8] The attempted pleading of a cause of action for breach of contract by repudiation is likewise so uncertain and defective as to warrant the sustaining of the demurrer. If the original oral negotiations constituted the contract, the statute of frauds was a bar and could be raised by demurrer. See *Harper v. Goldschmidt*, 156 Cal. 245, 104 P. 451, 28 L.R.A., N.S., 689, 134 Am.St.Rep. 124. If the action was for breach of the written lease, there is no allegation that such a lease was actually entered into by the parties, and in fact the complaint discloses that the theory of the action is that the defendant failed to enter into the lease but represented to plaintiffs that it had. Nor does the complaint plead the essential element of performance of conditions and covenants by the plaintiffs. See *Fenn v. Pickwick Corp.*, 117 Cal.App. 236, 242, 4 P.2d 215; *Los Angeles G. & E. Co. v. Amalgamated Oil Co.*, 156 Cal. 776, 106 P. 55.

The judgment is affirmed.

PEOPLE v. BAKER.

Cr. 3050.

District Court of Appeal, Second District,
Division 2, California.

Feb. 7, 1938.

Rehearing Denied Feb. 18, 1938.

Hearing Denied by Supreme Court

March 9, 1938.

1. Criminal law ⇨511(7)

The corroboration necessary to support a conviction may be furnished by any substantial evidence not that of an accomplice, and the defendant's own statements and admissions made in connection with other testimony may afford corroboratory proof. Pen. Code, § 1111.

2. Criminal law ⇨517(4)

In prosecution for grand theft and conspiracy to defraud, testimony of witnesses and accused which pertained to extra-judicial admissions of accused were admissible in evidence to establish corroboration of accomplices, and tended to connect accused with commission of the crime, as against contention that corpus delicti was not proved. Pen.Code, § 182, subd. 4; § 1111.

3. Criminal law ⇨511(7,8)

In prosecution for grand theft and conspiracy to defraud, testimony of witness and accused which pertained to extra-judicial admissions of accused sustained conviction. Pen.Code, § 182, subd. 4; § 1111.

4. Criminal law ⇨370, 371(2), 372(5,6)

In prosecution for grand theft and conspiracy to defraud, testimony relating to other offenses was admissible to show guilty knowledge and intent of accused, and to establish definite prior design and a continuing conspiracy, notwithstanding the other offenses did not result in commission of crime since evidence of the other offenses was admissible if they tended to prove a scheme of defendant which included the acts charged. Pen.Code, § 182, subd. 4.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Dr. John E. Baker was convicted of conspiracy to defraud of property by criminal means and to obtain property by false pretenses, and of grand theft, and he appeals.

Affirmed.

Harold Judson and Robert E. Ford, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., R. S. McLaughlin, Deputy Atty. Gen., and Buron Fitts, Dist. Atty. of Los Angeles County, and Jere J. Sullivan and George Stahlman, Deputies Dist. Atty., all of Los Angeles, for the People.

CRAIL, Presiding Justice.

This is an appeal from a judgment of conviction and from an order denying a new trial of an indictment in which the defendant, along with several coconspirators, was accused of the crime of criminal conspiracy to cheat and defraud the Farmers Automobile Inter-Insurance Exchange of property by criminal means and to obtain money and property by false pretenses in violation of section 182, subd. 4, of the Penal Code, and also of the crime of grand theft from the same corporation as the result of the same conspiracy, it being alleged that they conspired to cheat and defraud said corporation of \$1,350, and that in furtherance of this conspiracy they fractured the arm of Peter N. DeNooy, and that they made certain false and fraudulent statements concerning the manner in which the alleged accident occurred, and that they filed a false claim with said company of a purported accident. Some of the defendants pleaded guilty and the action was dismissed as to others of them, so that finally the defendant Baker alone was tried and convicted on both counts.

It is the contention of the defendant that the evidence is legally insufficient to sustain the verdict because the prosecution failed to prove the corpus delicti of the offenses charged and because there is no legal corroboration of the accomplices. He calls our attention to the well-known rule that a conviction cannot be had on the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. Pen.Code, § 1111. And he relies upon People v. Kazatsky, 18 Cal.App.2d 105, 63 P.2d 299, People v. Kempley, 205 Cal. 441, 271 P. 478, and People v. Davis, 210 Cal. 540, 293 P. 32. He contends that, "In considering this point, the Court must bear in mind that the testimony of the witnesses Holcombe and Honza, as well as the statements of Dr. Baker, cannot be considered, inasmuch as they all pertain to extra-judicial admissions of defendant. It is well established that such type of evidence cannot be

used either in determining whether or not the corpus delicti has been proven, or in establishing the corpus delicti," and he cites *People v. Ray*, 91 Cal.App. 781, 267 P. 593, *People v. Rodarte*, 74 Cal.App. 636, 241 P. 406, and *People v. Quarez*, 196 Cal. 404, 238 P. 363.

[1] The true rule on this principle of law is that the necessary corroboration may be furnished by any substantial evidence not that of an accomplice, and the defendant's own statements and admissions made in connection with other testimony may afford corroboratory proof. *People v. Negra*, 208 Cal. 64, 280 P. 354; *People v. Bonner*, 5 Cal.App.2d 314, 42 P.2d 694; *People v. Follette*, 74 Cal.App. 178, 204, 240 P. 502. "The proof of the corpus delicti, which must be produced before admissions or confessions of the defendant may be allowed to be put in evidence, need not be sufficient to satisfy the minds of the jurors beyond a reasonable doubt of the corpus delicti. It is sufficient if the preliminary proof be of a substantial character tending to establish the corpus delicti. * * * Such substantial evidence may be corroborated and strengthened by admissions and confessions of the defendant, and the proof beyond a reasonable doubt required by the law thus supplied.' See, also, *People v. Roganovich and Duzich*, 77 Cal.App. 158, 246 P. 132. It is apparent from this review of the cases that the general trend of authority has been to hold that, upon prima facie proof of the corpus delicti, the extrajudicial statements, admissions, or confessions of the accused may be admitted in evidence, and, having been so properly admitted, they may, with the evidence aliunde, be considered by the jury in its determination whether or not all the elements of the crime and the connection therewith of the accused have been established to a moral certainty and beyond all reasonable doubt." *People v. Selby*, 198 Cal. 426, 437, 245 P. 426, 431.

The cases relied upon by the defendant do not sustain his contention. The case of *People v. Ray*, supra, does hold that the extrajudicial statements or admissions of a defendant in the absence of other evidence of the commission of the crime charged against him are insufficient to establish his guilt, but it also says, 91 Cal.App. 781, at page 785, 267 P. 593, 595, "To authorize the reception in evidence of such extrajudicial

statements, admissions or confessions, or their consideration by the jury, it is not necessary that the other evidence of the corpus delicti prove it beyond a reasonable doubt; prima facie proof is sufficient for either purpose. 8 Cal.Jur. 235; *People v. Selby*, 198 Cal. 426, 245 P. 426." The case of *People v. Rodarte* merely holds that where birth in a foreign country is an essential part of the corpus delicti and there was no corroboration of the defendant's extrajudicial admissions of foreign birth, the evidence is insufficient to prove that element of the crime.

[2, 3] It is apparent from the foregoing that not only the statements of the defendant himself but the testimony of Mr. Holcombe and Mr. Honza may be used to establish corroboration of the accomplices, and that such extrajudicial statements and admissions of the defendant, along with all the other facts and circumstances in the case, do corroborate the accomplices and do tend to connect the defendant with the commission of the crime charged.

[4] It is the next contention of the defendant that the court erred in refusing to strike the testimony relating to other offenses because the corpus delicti of the alleged similar offenses also was not sufficiently established. This evidence was admissible to show guilty knowledge and the intent of the defendant and to establish a definite prior design or system, and a continuing conspiracy, and it is not essential that such similar transactions shall have resulted in the commission of a crime. It is sufficient if they tend to prove a scheme of the defendant which included the acts charged. *People v. Robinson*, 107 Cal.App. 211, 224, 290 P. 470; *People v. Anderson*, 95 Cal.App. 225, 272 P. 755; *People v. Arnold*, 17 Cal.App. 68, 73, 118 P. 729; *People v. Shearer*, 83 Cal.App. 321, 332, 256 P. 611.

The defendant next contends that the court erred in refusing to strike the statement of the defendant made in the district attorney's office, the defendant again contending that the corpus delicti cannot be established by extrajudicial statements of a defendant. This matter has been fully covered by what we have already said.

The judgment and order are affirmed.

We concur: WOOD, J.; McCOMB, J.

OLIVEIRA et al. v. WARREN et al.**Civ. 5907.****District Court of Appeal, Third District,
California.****Feb. 5, 1938.****1. Damages ⇨216(4, 7)**

Evidence in personal injury suit *held* to justify instruction authorizing award of reasonable sum for physical pain and mental suffering, resulting, or reasonably certain to result in future, from injuries, in determining amount of damages.

2. Damages ⇨185(1)

Expert testimony of men learned in human anatomy from examination of patient, history of his case, or hypothetical question, that he may be expected with reasonable certainty to experience future pain as result of established injury must be offered to recover damages for such pain, where injury is subjective and such that laymen cannot know with reasonable certainty whether there will be future pain and suffering.

3. Damages ⇨132(3)

A verdict, awarding woman \$10,000 damages for permanent disfiguring scar on her forehead, abscesses between cranium and periosteum, pain in face and teeth because of crushed sensory nerve, injuries to coccyx and knee correctible only by surgical operations of doubtful efficacy, reasonably certain future pain and suffering, and hospital and medical expenses, was not excessive.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by Adelaide Oliveira and another against E. Guy Warren, doing business under the firm name and style of Bettencourt & Warren, and others, to recover damages for injuries sustained in an automobile accident. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Hawkins & Hawkins, of Modesto, for appellants.

F. M. Ostrander, of Merced, and D. Oliver Germino, of Los Banos, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This appeal is from a judgment where-in plaintiffs recovered from defendants damages arising out of an automobile accident.

It was stipulated that the plaintiffs' injuries were proximately caused by the negligence of the defendants, and evidence was offered to prove the extent of such injuries. It was established that the injuries of plaintiff Adelaide Oliveira consisted of an injury to the knee, and a wound on the scalp and forehead, which resulted in a scar somewhat in the form of the figure "H," one side of the "H" being approximately six inches in length and the other four inches in length. She also received an injury to her coccyx, and suffered from headaches and dizziness. For these injuries the jury awarded to Adelaide Oliveira \$10,000.

[1] Upon this appeal appellants complained of an instruction to the jury to the effect that in determining the amount of the damages to which the plaintiff Adelaide Oliveira was entitled they could consider "such reasonable sum as the jury may award for physical pain and mental suffering, if any, or reasonably certain to be suffered in the future from the injuries, if any."

The contention of appellants is, briefly, that the burden of proof was upon the plaintiff to prove damages, and she could not recover damages for future pain unless the evidence showed that it was reasonably certain that such pain would be suffered in the future, and, before recovery of personal damages could be obtained for apprehended future consequences of an injury, there must be such a degree of probability of future pain occurring as to amount to reasonable certainty that such will result from the original injury. Also, where the injury is subjective and of such a nature that a layman cannot, with reasonable certainty, know whether or not there will be future pain and suffering, then, in order to warrant such an instruction as given above, and to authorize a verdict for future pain and suffering, there must be offered evidence by expert witnesses who can testify that the plaintiff, with reasonable certainty, may be expected to experience future pain.

With this statement we have no particular quarrel. We believe, however, that an examination of the record will show that plaintiffs have maintained the burden required of them and that the court was jus-

tified in giving the instruction here complained of.

In regard to the injury to the knee of Mrs. Oliveira, Dr. Hillyer described the limitation of motion found in the knee action of plaintiff, and the damage to the kneejoint itself. The doctor pointed out that the plaintiff was a woman weighing 260 pounds, and that the only relief to her would be the removal of the cartilage or cushion in the kneejoint. The doctor pointed out that this cartilage acted as a cushion which, if removed, would leave no pad in the joint that nature had placed there for the purpose of absorbing shock. The only remedy would be an operation, and, in view of the fact that the kneejoint was easily infected and had little resistance to infection, he expressed it as his opinion that it was doubtful whether such an operation should be performed. When asked further in regard to the knee, he said, "it probably will always remain painful, that knee."

Mrs. Oliveira complained also of having headaches and dizzy spells after the accident. It appears from her testimony that at the time of the accident she was rendered unconscious by a blow and suffered considerable shock. From this Dr. Hillyer testified it was reasonable to assume that Mrs. Oliveira suffered considerable damage to her brain structure, causing concussion and possibly a slight contusion, and that no one could predict the ultimate outcome of a head injury, as sometimes a slight head injury could cause serious complications which might develop months or even two or three years later. The doctor was then asked: "Q. As I understand, so far as these headaches and dizziness are concerned, those are permanent? A. Those are permanent, yes."

The witness complained of severe pain in the region of the coccyx, and it was testified by medical witnesses for plaintiff that, inasmuch as some eight months had elapsed from the time of the injury to the date of the trial, and no improvement had been shown, it was reasonable to assume that the condition would not improve without operative surgery. When asked if an operation would remove the trouble, a doctor testified:

"If it were removed, the pain on sitting on the tailbone would be relieved, but she would then be without a tailbone, which serves as a support to the pelvic muscle.

"Q. Would it affect her in after life? A. It would affect her to a certain extent.
* * *

In regard to the scar across the forehead, Dr. Hillyer testified: "The wound has healed with scar tissue and that becomes adhesive to the scalp and she has left a very hideous disfiguring scar on the forehead and scalp, which can never be removed; there is no skin over the area covering the scalp bone, except that which nature has tried to replace with scar tissue; scar tissue of course is a good resistance to infection, but it is very easily broken down under the slightest provocation."

In *Jordan v. Cedar Rapids & M. C. R. Co.*, 124 Iowa 177, 99 N.W. 693, 695, the court said: "The question of future pain is generally more or less speculative, because its existence or nonexistence is a matter very largely within the knowledge of the injured person alone; but where there is evidence of a permanent injury, and of present pain produced thereby, the jury may consider such facts, and conclude therefrom that future pain may be suffered."

The foregoing indicates in a general way some of the testimony before the jury in regard to the permanency of the injuries mentioned and the probability of resulting future pain and suffering, but we think sufficient appears to make plain the general character of this testimony.

The question propounded by appellants is, Does the foregoing justify the giving of the instruction complained of?

A somewhat similar question was presented in *Cordiner v. Los Angeles Traction Co.*, 5 Cal.App. 400, 91 P. 436. The doctors there in conservative language expressed it as their opinion that a brain injury sustained by the plaintiff might produce convulsions and paralysis, and that there was a danger of mental deterioration. The court held that such testimony tended to prove the ultimate fact, that is, the reasonable certainty that future evil consequences would result from the injury, and that it was for the jury to weigh and determine its value as proof.

In *Ward v. De Martini*, 108 Cal.App. 745, 292 P. 192, an objection was raised that the evidence was insufficient to warrant giving the instruction upon the question of future pain and suffering. The testimony by one doctor was that the injury would probably be permanent; another doctor testified that with proper treatment plaintiff might recover but recovery would be slow. The court held there was no error in the giving of the instruction, and the testimony was

sufficient to support the conclusion that the injuries were likely to be permanent.

Appellants also claim that, where the injury is subjective, to warrant a verdict for future pain and suffering, evidence must be offered by expert witnesses that the plaintiff, with reasonable certainty, may be expected to experience future pain and suffering as a result of the injury.

[2] It is undoubtedly the rule as contended by appellants that, where an injury is subjective and of such a nature that laymen cannot, with reasonable certainty, know whether or not there will be future pain and suffering, expert evidence by men learned in human anatomy must be offered, who can testify either from an examination of the patient, by history of the case, or by hypothetical question, that the plaintiff with reasonable certainty may be expected to experience future pain as a result of the established injury.

Here we find evidence sufficient to bring this case within those requirements. In regard to the pain in the face and jaw, the examining physician found that plaintiff had sustained a crushing blow on the cheek, injuring the sensory nerve which would cause the pain and numbness complained of.

The injury to the knee evidenced by restricted motion, swelling, and bruises indicated to one familiar with the structure of the kneejoint that pain was present aside from the complaints of the patient. Here on manipulation the doctor testified he knew objectively that plaintiff suffered pain. Likewise the doctor, being informed of the nature of the head injury, the loss of consciousness, the growing irritability of the patient, was able to state that some injury has been done to the brain.

In examining the coccyx the examining physician determined the presence of pain not only by the voluntary statement of the patient but by the muscular reaction of the patient, and from his knowledge of the coccyx he could testify as to its condition and the necessity of an operation to afford relief. These excerpts from the record would tend to establish the required proof.

[3] Complaint also is made that the verdict and the judgment are excessive. Examination of the record does not reveal undue passion nor prejudice upon the part of the jury.

Remembering the scar upon the forehead of plaintiff, which one doctor described as "a very hideous disfiguring scar" which never

could be removed, that plaintiff suffered for many months from a series of abscesses which formed between the cranium and the periosteum; that the sensory nerve of the right cheek, which was crushed, caused pain and suffering on the side of the face and the teeth, and the injury to the coccyx, which could be corrected, if at all, by a surgical operation of doubtful efficacy, as well as to the injury to the knee, which likewise would require a surgical operation, the result of which is uncertain, together with the pain and suffering which the jury found that plaintiff was reasonably certain to suffer in the future, and the expenses of the hospital and medical attendance—all tended to justify the verdict returned by the jury.

A motion for a new trial also was made upon the ground that the verdict was excessive, which motion was denied by the trial judge. He had an opportunity to observe the plaintiff and hear the witnesses, and he was satisfied with the amount of the judgment.

Finding no error in the record before us, the judgment should be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.



RAE v. CALIFORNIA EQUIPMENT CO.*

Civ. 11606.

District Court of Appeal, Second District,
Division 2, California.

Feb. 4, 1938.

Rehearing Denied Feb. 28, 1938.

Hearing Granted by Supreme Court
April 4, 1938.

1. Appeal and error ⇐927(3)

The reviewing court must consider the evidence most favorable to plaintiff in considering judgment predicated upon the granting of a motion for a nonsuit.

2. Municipal corporations ⇐601

"Owner," as used in municipal ordinances requiring "owner" of hoists to have them inspected and licensed before use, construed in its ordinary acceptance, is one who, owning property, uses it himself or by or through his servant or agent, and does not mean one who holds merely the naked legal title to personalty after having relinquished

to another the exclusive management, possession, and control of the chattel.

[Ed. Note.—For other definitions of "Owner," see Words & Phrases.]

3. Bailment §21

An owner who lends property and transfers the entire possession and control of it to another is not responsible for the wrongful use or mismanagement of it by the transferee, but whoever has the exclusive possession and control is alone responsible for its mismanagement.

4. Bailment §21

Where lessee of electric hoists set up and used hoists in shaft leading down to tunnel without complying with municipal ordinance requiring "owner" of hoists to have them inspected and licensed before use, lessor was not negligent so as to be liable for injuries sustained by plaintiff who was injured while riding in cage of hoist, where hoist, at time of injury, was not under control or management of lessor.

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Action by Bud Rae against the California Equipment Company for injuries sustained by the plaintiff while riding in the cage of an electric hoist rented by the defendant to the Fox Film Corporation. Judgment for the defendant after the defendant's motion for a nonsuit was sustained, and the plaintiff appeals.

Affirmed.

Murchison & Clopton and Mort L. Clopton, all of Los Angeles, for appellant.

Pacht, Pelton, Warne & Black, Isaac Pacht, and Alfred P. Chamie, all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after the trial court granted defendant's motion for a nonsuit in an action to recover damages for personal injuries, plaintiff appeals.

[1] Viewing the evidence most favorable to plaintiff, as we must in reviewing a judgment predicated upon the granting of a motion for a nonsuit, the material facts are these:

Shortly prior to September 24, 1934, the date of the accident hereinafter described, defendant rented to Fox Film Corporation two electric hoists. The Fox Film Corporation by means of cables connected these machines to a cage which was lowered and raised in a shaft leading down to a tunnel. The equipment was thus placed for the purpose of being used in connection with the filming of certain motion pictures. Carl Davidson had been employed by Fox Film Corporation to operate the hoists. In order to lower the cage it was necessary to disengage the clutch on the hoists to permit the drums on them to run free. The speed at which the drums revolved was controlled by a foot brake attached to the drums.

On the date above mentioned, plaintiff and several other men stepped into the cage, while it was in such a position that Mr. Davidson could not see it. Upon receiving a signal to lower the cage, he did so by disengaging the clutch. The weight in the cage was too much for the brake pressure, which he applied, with the result that the cage fell to the bottom of the shaft and plaintiff received serious personal injuries.

This is the sole question presented for determination: *Did any negligent act of defendant contribute to plaintiff's injury?*

This question must be answered in the negative. At the time of the accident the following ordinances were in effect in the city of Los Angeles:

"Los Angeles City Ordinance No. 33,512 (N.S.) as Amended by Ordinances Nos. 63,023 and 69,810.

"Sec. 9. It shall be unlawful in the City of Los Angeles for * * * the owner * * * thereof to cause or permit to be used or operated: Any * * * hoist * * * unless such person shall have an unexpired and unrevoked license issued by the Board of Mechanical Engineers of the City of Los Angeles for the use or operation thereof, which said license shall clearly set forth the particular apparatus, machinery or equipment for which it shall have been issued;

"Sec. 26. Payment of Inspection Fees. It shall be unlawful for any person, firm or corporation to * * * cause or permit to be used or operated, any of the equipment or apparatus mentioned in this ordinance until after the same shall have been inspected * * *

"Sec. 27. It shall be unlawful for any person, firm or corporation * * * to cause or permit to be used * * * any equipment mentioned in this ordinance for the transportation of passengers or freight until the certificate of inspection of such equipment shall have been issued by the Board of Mechanical Engineers. * * *

[2] The requirements of the above ordinances had not been complied with either by defendant Fox Film Corporation or Mr. Davidson, and it may be conceded for the purposes of this case that the hoists did not comply with the requirements of other ordinances of the city of Los Angeles. However, the mere legal ownership of the hoists did not impose a liability on defendant to comply with the city ordinances. In our view, the word "owner" used in the above-mentioned ordinances is to be construed in its ordinary acceptation; that is, one who, owning property, uses it himself or by or through his servant or agent, and is inapplicable to one who holds merely the naked legal title to personal property after having relinquished to another the exclusive management, possession, and control of the chattel.

[3] The correct rule is stated in *Gulzoni v. Tyler*, 64 Cal. 334, at page 336, 30 P. 981, 982, by Mr. Justice Sharpstein: "The rule, as stated in *Shearman and Redfield on Negligence* (section 501), is that if the owner of property lets or lends it, and transfers the entire possession and control of it to another, the owner is not responsible for the wrongful use or mismanagement of it by the transferee. Whoever had the exclusive possession, management, and control of the boat, its officers and men, was alone responsible for its mismanagement; and whether rightfully or wrongfully in such possession the liability would rest on them alone."

The foregoing rule of law is entirely reasonable. Otherwise, a vendor of hoists under a conditional sales contract would be liable to a party injured through the failure of the conditional vendee to comply with city ordinances. This obviously would be an unreasonable requirement, since the vendor would be entirely without the power to require his vendee to comply with the law.

[4] It is conceded that neither defendant, its servants, or agents were operating the hoists at the time of the injury to

plaintiff, and thus any failure to comply with the law did not constitute negligent acts for which it was responsible.

Therefore, the trial court's order in granting defendant's motion for a nonsuit was correct.

The order is affirmed.

I concur: CRAIN, P. J.

WOOD, Justice.

I dissent. In my opinion evidence was introduced which would support findings that defendant leased to Fox Film Corporation an electric hoist which was not constructed or equipped as required by law, and which was unsafe for the purposes for which it was leased, that the lessor did not use reasonable care to make it safe, and did not inform the lessee of its unsafe condition. Such findings would support a verdict in favor of the plaintiff. Restatement of the Law of Torts, § 408. The motion for a nonsuit should have been denied.



PEOPLE v. DAVENPORT. *

Cr. 3052.

District Court of Appeal, Second District,
Division 2, California.

Feb. 4, 1938.

Hearing Granted by Supreme Court
March 2, 1938.

1. Indictment and Information ☞ 63

An indictment charging defendant with having violated the Corporate Securities Act by selling a security, set out in words and figures, without having first secured a permit from the Commissioner of Corporations, without any accompanying allegations of fact, was demurrable as stating mere conclusions rather than allegations of fact constituting a public offense. St.1917, p. 673, as amended.

2. Licenses ☞ 18½

A simple purchase and sales contract is not a "security" either under common acceptance or by definition in the Corporate Securities Act. St.1917, p. 673, as amended.

[Ed. Note.—For other definitions of "Security," see Words & Phrases.]

3. Licenses $\Rightarrow$ 18½

The restraints and penalties of the Corporate Securities Act are placed upon the vendor and not upon the vendee. St.1917, p. 673, as amended.

4. Licenses $\Rightarrow$ 18½

A contract to purchase certain building and loan association certificates from the owner thereof and to pay a purchase price in 25 monthly installments at a stipulated interest did not constitute a "security" which would necessitate that a permit from the Commissioner of Corporations be secured for the sale thereof. St.1917, p. 673, as amended.

5. Licenses $\Rightarrow$ 40

An indictment charging defendant with having agreed to purchase certain building and loan association certificates from the owner at a price payable in monthly installments, without having first secured a permit from the Commissioner of Corporations, did not state a public offense. St.1917, p. 673, as amended.

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Noel Davenport was charged with violation of the Corporate Securities Act. From a judgment sustaining a demurrer to 18 counts of an amended indictment, the People appeal.

Affirmed.

U. S. Webb, Atty. Gen., Walter L. Bowers, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, for the People.

Morris Lavine, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment sustaining a demurrer to eighteen counts of an amended indictment purporting to charge defendant with violations of the Corporate Securities Act, St.1917, p. 673, as amended, the People appeal.

The essential facts are these:

October 22, 1937, an amended indictment was filed in the superior court of Los Angeles county purporting to charge defendant in twenty separate counts with

violations of the Corporate Securities Act. Defendant filed a demurrer to the amended indictment on the ground that each count failed to allege facts constituting a public offense. The demurrer was overruled as to counts XIII and XIV and sustained as to all the remaining eighteen counts.

Count I of the indictment reads as follows:

"The said Noel Davenport is accused by the Grand Jury of the County of Los Angeles, State of California, by this Amended Indictment of the crime of Violation Corporate Securities Act, a felony, committed prior to the finding of this Indictment, and as follows:

"The said Noel Davenport, on or about the 23d day of October, 1933, at and in the county of Los Angeles, state of California, did willfully, unlawfully, feloniously and knowingly authorize, direct and aid in the issuance and sale of, and did issue, execute and sell, and assist in causing to be issued, executed and sold to Ella J. Bloom for value, a security of his own issue, to-wit, an evidence of indebtedness, note and investment contract, said security not being one issued, given or acquired in a bona fide way in the ordinary course of legitimate business, trade or commerce, and said security being one issued for sale to the public by the said Noel Davenport, the said Noel Davenport not having first applied for and secured a permit from the Commissioner of Corporations of the state of California so to do; the said security being in words and figures as follows, to-wit:

"'Agreement Noel Davenport and Ella J. Bloom or L. B. Bloom 635 Ohio Ave Long Beach

"'Noel Davenport, hereinafter designated as First Party, and Ella J. Bloom or and L. B. Bloom, hereinafter designated as Second Party, both of the county of Los Angeles, State of California, do hereby respectively declare as follows:

"'Declaration of First Party. That he now is and for some considerable time heretofore has been engaged in the business of buying and selling gold and silver bullion, maintaining a principal place for the transaction of said business at Nogales, Arizona, in the conduct of which he has contracted to purchase the gold and silver production from a number of mining properties now in actual operation in the Altar Mining District of Mexico.

"That to avail himself of the increased production of said bullion additional capital is required to finance his operations, which will be used only in the business of merchandising gold and silver bullion and for no other purpose whatsoever.

"That his present and past experience leads him to believe that the continuance of this business will be profitable and his experience has been that a profit of not less than fifty (50%) per cent can be realized upon shipments of bullion as they are made from time to time.

"That he is thoroughly conversant with the character of business in which he is now engaged and conducts said business on his own individual responsibility, and that he believes that he is established in a way that he can continue to operate successfully in the future.

"Declaration of Second Party. That he has read the above and foregoing statement and that First Party has made no representations other than therein contained to induce him to execute this agreement and that he does so freely and voluntarily, on his own initiative and responsibility without any promise, agreement, representation, or inducement except as herein contained, and with no hope of profit or reward other than the payment of the purchase price herein stipulated.

"That said sale is made without any restriction or limitation with the understanding that First Party may use and dispose of said securities as the absolute owner thereof and that his agreement to pay therefor as herein provided is the sole and only consideration therefor, and that the only obligation of First Party is the debt evidenced hereby.

"That he has made no representation as to the value of said securities and that the selling price therefor is fixed and determined without reference to the present market value and that any difference between the selling price as fixed hereby and the market value shall not be a defense available to First Party either on the ground of usury or otherwise.

"By Reason Whereof, the said Parties do hereby agree as follows:

"1. That First Party agrees to buy from Second Party and Second Party agrees to sell to First Party, for the sum of \$795.47, payable in lawful money of the United States in the manner herein after set forth, the following securities,

the receipt whereof with the proper endorsement thereon transferring title to First Party is hereby acknowledged, to-wit:

"Mutual B and L Assoc Commonwealth B and L Assoc

"2. That First Party promises and agrees to pay to Second Party said sum in the following manner:

"(a) The sum of \$..... upon the execution of these presents, receipt whereof is hereby acknowledged;

"(b) The balance of said purchase price, of the sum of \$795.47, in equal monthly installments of four (4%) per cent of said principal sum for a period of twenty-five (25) months on the first day of each and every month, commencing on the first day of December, 1933, and continuing until said purchase price has been paid in full, together with interest on all deferred payments at the rate of seven (7%) per cent per annum, payable quarterly, from date hereof.

"3. That the payments of principal and interest shall be made at the California-First National Bank of Long Beach, at First Street and Pine Avenue, in the City of Long Beach, California, and that said Bank will be designated and appointed as agent of First Party to receive and disburse moneys belonging to First Party and that said payments hereinabove provided for shall be made by said Bank to Second Party, each of which such payments shall be endorsed upon the contract in the possession of Second Party and the duplicate in the possession of said Bank.

"4. That in the event any fourth consecutive installment of principal or interest be not paid as herein promised and agreed, Second Party may declare the whole of said sum, principal and interest then unpaid, due and payable and in the event suit is filed to enforce payment hereunder the Court shall fix and allow a reasonable attorney fee therefor.

"5. That to secure the performance of the terms and provisions hereof and as collateral security for the payments herein provided for, First Party will cause a policy of life insurance upon his life to be issued for the amount agreed to be paid hereunder, in which the said California-First National Bank of Long Beach will be made beneficiary under an agree-

ment that in the event of the death of First Party the proceeds thereof shall be used and applied in payment of such amount as may be due Second Party under the provisions hereof.

"6. This instrument is nonnegotiable and shall not be assigned by either party without the written consent of the other.

"In Witness Whereof, said Parties hereto have hereunto subscribed their names hereto, in triplicate, this 23 day of October, 1933.

"(Signed) Noel Davenport

"First Party

"(Signed) Ella J. Bloom

"Second Party."

"That the defendant was absent from and not an inhabitant of, nor usually a resident within, the State of California for the period from April 8, 1934 to April 8, 1936, between the date of the offense alleged in this Amended Indictment, and the date of the filing of this Amended Indictment."

Except as to dates and names, counts II and XII, both inclusive, and XV to XX, both inclusive, are identical.

The People rely for reversal of the judgment on the following proposition:

Each of the counts as to which the demurrer was sustained states a public offense, in that the contract alleged in such counts constitutes a security within the meaning of the Corporate Securities Act.

[1] This proposition is untenable. Our Supreme Court and the District Court of Appeal have heretofore held that allegations similar to those in the first and second paragraphs of count I of the amended indictment without any accompanying allegations of fact are merely conclusions of the pleader and are not allegations of facts which constitute a public offense. *People v. Davenport*, Cal.App., 69 P.2d 862.

[2-5] There is therefore left for determination the single question of whether the agreement alleged in count I of the indictment constitutes a security. Eliminating the preamble to the agreement, which it is conceded contains nothing but immaterial recitals, we have a simple contract whereby defendant agrees to purchase from the owner thereof certain building and loan association certificates and pay as a purchase price for the same \$795.47 in twenty-

five monthly installments with interest at the rate of 7 per cent. per annum on any unpaid balance.

It needs no citation of authorities to demonstrate the proposition that a simple purchase and sales contract is not a security either under common acceptance or by any definition in the Corporate Securities Act. Nowhere in the Corporate Securities Act is there any requirement that one who purchases personal property must first obtain a permit from the Commissioner of Corporations of the state of California, nor has any case been called to our attention where it has been held that it is necessary for a vendee to obtain a permit before entering into a contract to purchase personal property. The very purpose of the Corporate Securities Act was to require the vendor of personal property defined in the act to obtain a permit before such property or an interest therein was sold. The restraints and penalties of the act are placed upon the vendor and not upon the vendee. In the instant case it is obvious from a reading of the contract that defendant was the vendee and not the vendor of the property. Therefore, there was no requirement that he obtain a permit before entering into the contract alleged in count I of the amended indictment, and it fails to state a public offense.

It would serve no useful purpose to discuss the various authorities cited by counsel. Suffice it to say that each case cited by the People may be distinguished on its facts from the present case; for example in *People v. White*, 124 Cal.App. 548, 12 P.2d 1078, defendant White agreed to invest \$5,000 advanced to him and on a certain designated date return \$7,500 as principal and *earnings* for the period during which he was to have possession of the money. It is clear that such a case is entirely different from the instant case wherein defendant agreed to purchase personal property, which became his absolutely without qualification upon his paying the purchase price.

It is of interest to note that the learned trial judge in the present case is the author of the opinion in the case of *People v. White*, supra, and undoubtedly he had the above-mentioned distinction in mind when making the order sustaining the demurrer to the various counts of the amended indictment, which is here under consideration.

For the foregoing reasons, the judgment is affirmed.

I concur: CRAIL, P. J.

WOOD, Justice.

I dissent. In my opinion the instrument issued by defendant and delivered to Ella J. Bloom, "being one issued for sale to the public," is a security as defined by the act and construed by the courts. *People v. Coyle*, 134 Cal.App. 612, 25 P.2d 991; *Domestic and Foreign Petroleum Co. v. Long*, 4 Cal.2d 547, 51 P.2d 73; *People v. White*, 124 Cal.App. 548, 12 P.2d 1078; *Cecil B. De Mille Productions v. Woolery*, 9 Cir., 61 F.2d 45.



proceedings, and otherwise, court was authorized to overrule objection to her testimony that she was defendant's wife, notwithstanding ruling involved sufficiency of the evidence to show paternity and thus allegedly deprived jury of that determination. Code Civ.Proc. § 2102; Civ.Code, § 59.

5. Criminal law ⇨806(3)

In prosecution for incest with daughter and for contracting an incestuous marriage with the daughter, where court instructed that defendant could not be found guilty unless evidence proved defendant's paternity of alleged daughter beyond a reasonable doubt, proposed instructions to effect that defendant should be acquitted if jurors were not satisfied beyond a reasonable doubt that defendant was the natural father of alleged daughter were properly refused as repetitions.

6. Criminal law ⇨511(7)

In prosecution for incest with daughter, statutory rape, and for contracting an incestuous marriage with the daughter, where defendant admitted that he was father of child to which alleged daughter had given birth, testimony of daughter as an accomplice was sufficiently corroborated, since admission of paternity had effect of a plea of guilty to at least one act of incestuous intercourse.

7. Incest ⇨4

Under statute, incest can be committed either by marriage between those of prohibited degrees of blood relationship, or by sexual intercourse between those so related. Pen.Code, § 285.

8. Marriage ⇨23

"Marriage" is a civil contract duly solemnized by a ceremony performed by an authorized person before witnesses, and entered into by a male and female not under such disability as to render the ceremony void, an application for license being the initial step.

[Ed. Note.—For other definitions of "Marriage," see Words & Phrases.]

9. Criminal law ⇨97

Generally, one who commits a crime is answerable therefor only in the jurisdiction where the crime is committed.

10. Criminal law ⇨97(1)

The state of California may by statute bring within its criminal jurisdiction the person who commits in part a crime within the state. Pen.Code, §§ 27, 778a.

24 Cal.App.2d 702

PEOPLE v. MacDONALD.

Cr. 355.

District Court of Appeal, Fourth District,
California.

Feb. 4, 1938.

1. Criminal law ⇨1023(8)

An order denying motion in arrest of judgment of conviction is not appealable. Pen.Code, § 1237.

2. Marriage ⇨10

A father's attempted marriage with his daughter is a nullity. Civ.Code, § 59.

3. Criminal law ⇨736(1)

In prosecution for incest with daughter, statutory rape, and for contracting an incestuous marriage with the daughter, sufficiency of the evidence to show paternity was necessarily involved in ruling on objection to her evidence on ground that she was defendant's wife, but question was again left to jury, whose decision was controlling and did not need to follow trial judge's ruling. Code Civ.Proc. § 2102; Civ.Code, § 59.

4. Witnesses ⇨79(3)

In prosecution for incest with daughter, statutory rape, and for contracting an incestuous marriage with the daughter, where defendant had recognized alleged wife as his daughter for many years by allotment for her support while in the navy, in divorce

11. Criminal law ⚖️97(1)

Where some act is committed in California that is an essential ingredient of the crime, a conviction may be sustained in California. Pen.Code, §§ 27, 778a.

12. Criminal law ⚖️97(1)

Where a crime is consummated in another jurisdiction, there must be some overt act in furtherance of the crime committed in California to give the California courts jurisdiction of the offense. Pen.Code, § 778a.

13. Criminal law ⚖️97(1)

A California court did not have jurisdiction to punish defendant for an incestuous marriage solemnized in Arizona, notwithstanding intention to marry was formed in California, and that defendant and alleged daughter returned to California and resumed cohabitation after the marriage. Civ. Code § 59; Pen.Code, §§ 27, 285, 778a.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Anstruther MacDonald was convicted of incest, of statutory rape, and of contracting an incestuous marriage, and he appeals.

Affirmed in part; reversed in part; dismissed in part.

Wallace P. Rouse, of Indio, and R. J. Welch, Jr., of Riverside, for appellant.

U. S. Webb, Atty. Gen., Paul D. McCormick, Deputy Atty. Gen., and Earl Redwine, Dist. Atty., and William O. Mackey and John G. Gabbert, Deputy Dist. Attys., all of Riverside, for the People.

MARKS, Justice.

[1] By an information filed by the district attorney of Riverside county, defendant was charged in separate counts with committing four crimes of incest with Marjorie MacDonald, his daughter, by means of sexual intercourse; of two crimes of statutory rape on the person of Marjorie during her seventeenth year, and with contracting an incestuous marriage with Marjorie. He was convicted on all counts. His motion for a new trial was denied, and he has appealed from the judgment and from that order. He has attempted to appeal from an order denying his motion in arrest of judgment, and other orders and rulings of the trial court, none of which are appealable. Section 1237, Penal Code; *People v. Jackson*, Cal.App., 74 P.2d 1085.

After Marjorie was sworn, defendant objected to her testifying against him on the ground that she was his wife. The objection was overruled, and she was permitted to testify at length as to her relations with him.

[2] The statutes of California, and Arizona where the marriage took place, prohibit the marriage of a father with his daughter. Section 59, Civil Code; section 2166, Revised Code of Arizona 1928, as amended by Laws 1931, c. 17, § 1. It is conceded that, if Marjorie was the daughter of defendant, the attempted marriage was a nullity and she could not be his wife. In *re Estate of Gregorson*, 160 Cal. 21, 116 P. 60, L.R.A.1916C, 697, Ann.Cas.1912D, 1124. It is argued that in overruling the objection the trial judge ruled that Marjorie was the daughter of defendant and thereby took that most important question of fact away from the jury. During the trial the defendant maintained that Marjorie was not his daughter but was the child of Florence Brode MacDonald and some other man.

Prior to the time of the objection, the People had introduced much evidence to prove that defendant was the father of Marjorie. Defendant cross-examined Marjorie on voir dire and proved that she went through a marriage ceremony with defendant and that the purported marriage had not been dissolved or annulled by decree of court.

[3,4] Section 2102 of the Code of Civil Procedure provides in part as follows: "All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it."

The question before us is not different from that presented to a trial judge when a confession is offered in evidence and which the defendant maintains was not voluntarily given. In those cases, as in the one before us, a mixed question of law and fact is presented which the trial judge must rule upon before the trial can proceed. The sufficiency of the evidence to show a voluntary confession (here the sufficiency of the evidence to show the paternity of Marjorie) is necessarily involved in a ruling on the objection to the admissibility of evidence. However, the question is again left to the jury, and the decision of that body is

controlling and need not follow the ruling of the trial judge.

In *People v. Lehew*, 209 Cal. 336, 287 P. 337, 339, it was said: "Whether a confession is free and voluntary is a preliminary question addressed to the trial court and a considerable measure of discretion must be allowed that court in determining it. *People v. Connelly*, 195 Cal. 584, 598, 234 P. 374; *People v. Castello*, 194 Cal. 595, 599, 229 P. 855; *People v. Siemsen*, 153 Cal. 387, 394, 95 P. 863; *People v. Wilson*, 79 Cal.App. 709, 713, 250 P. 879. In *People v. Siemsen*, *supra*, it is declared that the 'admissibility of such evidence so largely depends upon the special circumstances connected with the confession that it is difficult, if not impossible, to formulate a rule that will comprehend all cases. As the question is necessarily addressed in the first instance to the [trial] judge, and since his discretion must be controlled by all the attendant circumstances, the courts have wisely forbore to mark with absolute precision the limits of admission and exclusion.' * * * A reviewing court cannot say that the trial court committed error in admitting a confession of guilt, unless such error appears as a matter of law from the record presented. The trial court is clothed with considerable discretion in determining whether or not the confession was free and voluntary, and, where the evidence is conflicting on the subject, it must be assumed that the testimony concerning a defendant's admissions was properly admitted. *People v. Castello*, *supra*, 194 Cal. 595, at page 600, 229 P. 855; *People v. Shaffer*, 81 Cal.App. 752, 756, 757, 254 P. 666; *People v. Tugwell*, 28 Cal.App. 348, 152 P. 740."

A similar question was before the court in *People v. Glab*, 13 Cal.App.2d 528, 57 P.2d 588, 591. There the male party to a bigamous marriage was permitted to testify against the female, over her objection. In discussing the question, the court said: "Upon the authority of the above-cited case, we hold that the court in the instance before us for consideration, having before it facts showing the purported marriage did not come within the excepted classes of section 61 of the Civil Code, did not commit error in permitting the collateral attack upon the subsequent Steeger marriage. Its conclusion that the second marriage was void and illegal, that the purported marriage between the witness Steeger and appellant Steeger was in fact

no marriage at all, that the witness and Clara Steeger were not husband and wife, and that he therefore might testify against her unrestricted by the limitations of sections 1881 of the Code of Civil Procedure and 1322 of the Penal Code, followed inescapably. No error appears in the court's ruling."

The evidence supporting the conclusion that Marjorie was the natural daughter of defendant is overwhelming. Anstruther MacDonald and Florence Brode were married on May 2, 1917. Marjorie was born December 26, 1917, at Randsburg, Cal., while defendant and her mother were living together as husband and wife. Defendant recognized Marjorie as his daughter and continued to do so for many years. Defendant enlisted in the United States Navy and on August 19, 1918, made an allotment of part of his pay for the support of Florence MacDonald, his wife, and Marjorie MacDonald, his child. On February 14, 1922, Florence sued defendant for divorce and the custody of Marjorie. Defendant, in his verified answer and cross-complaint, alleged that Marjorie was a child of the marriage and sought her custody as her father. In 1930, Florence, the mother, died and Marjorie was sent to defendant. She lived in his household for sometime. Marjorie became involved with the law and apparently became a ward of the juvenile court of Los Angeles county. Defendant, as her father, provided for her support, and in a proceeding testified under oath that he was her father. He wrote numerous letters referring to Marjorie as his daughter. Defendant desired Marjorie to live with him in Indio in Riverside county, and in October, 1935, sent a telegram about the transfer in which he referred to Marjorie as his daughter. She joined him in Indio in November, 1935, where he introduced her as his daughter. It would be hard to imagine a case in which a father denied paternity where the evidence of paternity could be more satisfactory or convincing.

[5] Defendant complains of the modification of one instruction which he proposed, and others refused, to the effect that defendant should be acquitted of the charges of incest and incestuous marriage if the jurors were not satisfied beyond a reasonable doubt that defendant was the natural father of Marjorie. The trial judge several times instructed the jury that defendant could not be found guilty

unless the evidence proved his paternity of Marjorie beyond a reasonable doubt. The proposed instructions were properly refused because they were repetitious.

[6] Defendant maintains that Marjorie was an accomplice and that her testimony was not sufficiently corroborated. That she was an accomplice in at least some of the crimes is admitted. All the crimes charged, except the marriage, occurred in Indio. Marjorie and her father lived together in a small house with one bedroom in which there was but one bed. At one time they went to a hotel and occupied one room together, the defendant entering their names on the hotel register as man and wife. On October 1, 1936, Marjorie gave birth to a son. Defendant on the witness stand admitted he was the father of that child. The corroboration was complete. *People v. Jacobs*, 11 Cal. App.2d 1, 52 P.2d 945. The admission of the paternity of the son by defendant should have the actual, if not the legal, effect of a plea of guilty to at least one act of incestuous intercourse.

[7] There remains but one further question for our consideration; the jurisdiction of a California court to punish defendant for an incestuous marriage which was solemnized in Arizona. Counsel for both parties pass over this phase of the case with the citation of sections 27 and 778a of the Penal Code and little argument. They are not very helpful to the court on this important question.

It is true it was in Indio that the parties formed the intention of marrying. They boarded a train there and went to Phoenix. They returned to Indio and resumed cohabitation there until Marjorie ran away. This is the only evidence that would tend in any way to give a California court jurisdiction over a prosecution for the incestuous marriage.

It should be here observed that in an incest case there is no section of the Penal Code that would give a California court jurisdiction if that offense was committed in another state, such as the jurisdiction given in a case of theft committed in a foreign jurisdiction where the stolen property is brought into California, sections 497, 789, Pen.Code, and in a case of a bigamous marriage outside the state, followed thereafter by cohabitation in this state. Section 1106, Pen.Code.

Incest is thus defined in section 285 of the Penal Code: "Persons being within

the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or who commit fornication or adultery with each other, are punishable by imprisonment in the state prison not less than one year nor more than fifty years."

It is at once apparent from the section just quoted that the crime of incest can be committed in either of two ways; first by marriage between those of prohibited degrees of blood relationship; and, second, by sexual intercourse between those so related. Under the first the marriage ceremony completes the offense. Intercourse is not a necessary part of it. Under the second, the intercourse is made the crime. Marriage is no part of it. Under the count of the information we are considering we have only to do with the incestuous marriage in Arizona. Other counts of the information charge incestuous intercourse in Riverside county.

[8] Marriage is a civil contract entered into by a male and a female not under such disability as to render the ceremony void. Both in Arizona and in California the marriage must be duly solemnized. Besides the agreement of the parties there must be a license and a ceremony performed by an authorized person before witnesses. The initial step in an effective marriage contract is the application for the license. The parties may agree to marry, may make preparations to marry, but without a license and a ceremony there is no marriage.

[9] In *People v. Wilson*, 86 Cal.App. 160, 260 P. 330, 331, it is said: "Generally speaking, it is a fundamental rule of criminal procedure that one who commits a crime is answerable therefor only in the jurisdiction where the crime is committed, and in all criminal prosecutions, in the absence of statutory provisions to the contrary, the venue must be laid in such jurisdiction."

The same rule was announced in *State v. Volpe*, 113 Conn. 288, 155 A. 223, 226, 76 A.L.R. 1083, as follows: "It is a general rule of universal acceptance that one state or sovereignty cannot enforce the penal laws of another, nor punish offenses committed in and against another state or sovereignty."

[10-12] While these rules are firmly established and consistently followed, they do

not prohibit California from passing laws bringing within its criminal jurisdiction a person who commits, in part, a crime within this state, section 27, Pen.Code, or from providing that: "Whenever a person, with intent to commit a crime, does any act within this state in execution or part execution of such intent, which culminates in the commission of a crime, either within or without this state such person is punishable for such crime in this state in the same manner as if the same had been committed entirely within this state." Section 778a, Pen.Code.

Section 27 of the Penal Code has been frequently construed. It has been consistently held that, where some act is committed in California that is "an essential ingredient" of the crime, a conviction may be sustained in this state. *People v. Chapman*, 55 Cal.App. 192, 203 P. 126. See, also, *People v. Botkin*, 132 Cal. 231, 232, 64 P. 286, 84 Am.St.Rep. 39; *People v. Botkin*, 9 Cal. App. 244, 98 P. 861; *People v. Sanson*, 37 Cal.App. 435, 173 P. 1107. In the case of a burglary committed in Oregon, the constituent elements of which crime are "the breaking and entry of the building or structure belonging to another with intent to commit some crime," it has been held that a conviction in a California court cannot be sustained. *People v. McGowan*, 127 Cal. App. 39, 14 P.2d 1036. It also seems to be the rule that under section 778a of the Penal Code, where a crime is consummated in another jurisdiction, there must be some overt act in furtherance of the crime committed in California to give our state courts jurisdiction of the offense. *People v. Harden*, 14 Cal.App.2d 489, 58 P.2d 675.

New York has a similar statute to our section 27 of the Penal Code. In construing that enactment the Court of Appeals of New York said: "We think a crime is not committed either wholly or partly in this state, unless the act within this state is so related to the crime that if nothing more had followed, it would amount to an attempt." *People v. Werblow*, 241 N.Y. 55, 148 N.E. 786, 789. We have found no California case that has yet adopted the foregoing rule in its entirety.

There seems to be a scarcity of authority on the question before us. However, the old case of *People v. Murray*, 14 Cal. 159, would seem to be controlling here.

[13] The Supreme Court there said: "The evidence in this case entirely fails to sustain the charge against the defendant of an attempt to contract an incestuous mar-

riage with his niece. It only discloses declarations of his determination to contract the marriage, his elopement with the niece for that avowed purpose, and his request to one of the witnesses to go for a magistrate to perform the ceremony. It shows very clearly the intention of the defendant, but something more than mere intention is necessary to constitute the offense charged. Between preparation for the attempt and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made. * * * So in the present case, the declarations, and elopement, and request for a magistrate, were preparatory to the marriage; but until the officer was engaged, and the parties stood before him, ready to take the vows appropriate to the contract of marriage, it cannot be said, in strictness, that the attempt was made. The attempt contemplated by the statute must be manifested by acts which would end in the consummation of the particular offence, but for the intervention of circumstances independent of the will of the party."

The *Murray* Case has been cited with approval a number of times. See *Ex parte Floyd*, 7 Cal.App. 588, 95 P. 175; *People v. Lanzit*, 70 Cal.App. 498, 233 P. 816; *People v. George*, 74 Cal.App. 440, 241 P. 97; *People v. Parker*, 74 Cal.App. 540, 241 P. 401; *People v. Gilbert*, 86 Cal.App. 8, 260 P. 558; *People v. DiDonato*, 90 Cal. App. 366, 265 P. 978; *People v. O'Bryan*, 132 Cal.App. 496, 23 P.2d 94; *People v. Miller*, 2 Cal.2d 527, 42 P.2d 308, 98 A.L.R. 913.

From the foregoing it is our conclusion that the incestuous marriage took place in the state of Arizona and that defendant did not commit any element of that offense or do any overt act in connection therewith in California. It follows that the judgment pronounced upon defendant under the count of the information charging an incestuous marriage must be reversed. We have been assisted in reaching this conclusion by the principles announced in the following cases: *People v. Arnstein*, 211 N.Y. 585, 105 N.E. 814; *State v. Stephens*, 118 Me. 237, 107 A. 296; *Huntington v. Attrill*, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123; *State v. McAllister*, 65 W.Va. 97, 63 S.E. 758, 131 Am.St. Rep. 955; *State v. Ray*, 151 N.C. 710, 66 S. E. 204, 134 Am.St.Rep. 1005, 19 Ann.Cas.

566; *Short v. Commonwealth*, 243 Ky. 175, 47 S.W.2d 1074; *People v. Tyler*, 7 Mich. 161, 74 Am.Dec. 703; *Brown v. United States*, 35 App.D.C. 548, Ann.Cas.1912A, 388; *Wilson v. State*, 16 Okl.Cr. 471, 184 P. 603; *Jennings v. State*, 22 Okl.Cr. 412, 211 P. 89; *Ex parte Gresham*, 53 Okl.Cr. 425, 12 P.2d 709.

The portion of the judgment pronounced on defendant under the first, second, third, and fourth counts of the information charging incest by means of sexual intercourse, and under the sixth and seventh counts charging statutory rape, and the order denying defendant's motion for new trial on said counts, are, and each of them is, affirmed.

The portion of the judgment pronounced upon defendant under the fifth count of the information, charging an incestuous marriage, and the order denying defendant's motion for a new trial thereunder, are reversed.

The attempted appeal from the order denying defendant's motion in arrest of judgment, and from the other orders and rulings not specified herein, is dismissed.

I concur: BARNARD, P. J.



24 Cal.App.2d 696

ELMS v. ELMS (MONTAGNE, Intervener).

Civ. 10735.

District Court of Appeal, First District,
Division 2, California.

Feb. 4, 1938.

Hearing Denied by Supreme Court
April 4, 1938.

1. Trusts ⇨89(3)

Evidence in wife's divorce action held sufficient to sustain court's finding that money alleged to have been contributed by intervener for purchase of realty, found to be plaintiff's separate property, was received by plaintiff as loan, so that no trust resulted and intervener acquired no interest in property.

2. Trusts ⇨86

Whether statute, creating presumption of trust for person paying consideration for transfer of realty to another, is inapplicable because of parties' relationship in determin-

ing whether daughter, alleging as intervener in her mother's divorce action that she contributed portion of purchase price of realty found to be mother's separate property, acquired interest therein, need not be decided, where evidence showed that money paid was received by mother as loan. Civ.Code, § 853.

3. Trusts ⇨86

The statutory presumption of trust, resulting from payment of consideration for transfer of realty by another than transferee, may be rebutted by evidence of circumstances showing that money was advanced as loan or gift. Civ.Code, § 853.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Divorce action by Lola M. Elms against Fred G. Elms, in which Alberta E. Montagne intervened. From portions of a judgment and interlocutory divorce decree, denying intervener any interest in certain real property, intervener appeals.

Affirmed.

A. A. Montague, of Oakland, for appellant.

Gordon Johnson, of San Francisco, for respondent.

SPENCE, Justice.

This is an appeal by Alberta E. Montagne, the intervener, from certain portions of the judgment and interlocutory decree of divorce relating to a parcel of real property.

The plaintiff and defendant in the divorce action were respectively the mother and father of the intervener. The real property in question consisted of an apartment house which was found by the trial court to be the separate property of the plaintiff. The trial further determined that neither defendant nor the intervener had any interest therein. Defendant took no appeal, but the intervener appealed from the portions of the judgment and decree denying her any interest in said real property.

[1] It was alleged by the intervener that she contributed a portion of the purchase price of said real property and that it was agreed, at the time of the purchase, that the real property would be held in trust for her use and benefit "proportionately in conformity to the contribution and payments made." The trial court found against these allegations and made the following further

findings relating to the purchase of said property:

"That at the time the real property described in paragraph V hereof was purchased by plaintiff, intervenor Alberta E. Montagne advanced and loaned sums of money to plaintiff, but that all of said loans or advances were, in so far as said real property was and is concerned, made by intervenor on the basis of the general credit of plaintiff, and that said intervenor so regarded them; and that said intervenor at no time advanced or furnished funds to plaintiff for the purpose or with the understanding that said funds should be used to purchase or acquire an interest in said property for said intervenor. That the conduct and actions of said intervenor concerning said property have been inconsistent with any claim of ownership of, or an interest in, said property; that said intervenor permitted plaintiff to go into the possession of said property and make extensive improvements thereon at her own expense; that plaintiff has done all of the work required to maintain and operate said property and that said intervenor has done none of said work; that, with the knowledge of intervenor, plaintiff has collected the income from said property and disbursed it as she saw fit; that plaintiff, with the knowledge of said intervenor, has paid all costs and charges in connection with said property, and arranged and executed, on her own credit, all loans secured by said property; and that when said intervenor occupied an apartment in said property, she paid rent therefor to plaintiff."

These findings fully support the trial court's conclusions to the effect that there was no resulting trust in favor of the intervenor and that the intervenor had no interest in the property. Appellant states her contentions in various ways, but the only real question on this appeal is whether the evidence was sufficient to sustain the above-mentioned findings. Appellant contends that the evidence was insufficient for that purpose, but we find no merit in this contention.

The property was purchased in 1926 at a time when appellant was teaching school and living with her parents. It does not appear that any particular formality had attended the handling of financial matters as between the members of the family at any time. It appears that appellant paid no board, but she produced canceled checks showing the payment of sums of money to her parents at various times. There was evidence to show that at one time the mother purchased

a piece of property in Berkeley for \$500 and obtained the money from appellant. This lot was sold for \$2,100 at about the time of the purchase of the apartment house in question. There was further evidence to show that the mother obtained \$1,500 from appellant at the time of the purchase of the apartment house. It was appellant's claim that the \$500 and the \$1,500 were paid to her mother upon the agreement that the property purchased would be held in trust as alleged, but we believe that the findings of the trial court to the contrary are sustained by the evidence of appellant herself as well as by other evidence.

With respect to the sum of \$500 used in payment for the Berkeley lot, it appears from an informal memorandum introduced in evidence and from appellant's testimony with respect thereto that the parties had stated an account between themselves, in which this amount was credited to appellant. She was asked, "You accepted that statement, you and she sat down and figured that out and struck the balance?" Appellant answered, "Yes." She was further asked, "You never claimed to own that lot although you put up the purchase price?" Appellant answered, "No, I loaned them all the money for it." This evidence shows that appellant herself treated this transaction merely as a loan.

When the apartment house was purchased, substantial alterations were made by respondent. In making the purchase and the alterations, respondent used the \$2,100 from the sale of the Berkeley lot and the \$1,500 which she then obtained from appellant. In purchasing, respondent paid approximately \$1,561 in cash, gave her unsecured note for \$600, and assumed encumbrances amounting to \$6,500. While appellant testified that this property was to be an investment "for the two of us," her claim to an interest in the property was not asserted until nine years after the purchase. All of the above-mentioned findings with respect to the conduct of appellant during those nine years were sustained by the evidence of appellant herself and said conduct was inconsistent with her claim to an interest in the property. It is therefore apparent that the trial court's determination that the money was received by respondent from appellant as a loan and that no trust resulted are fully sustained.

[2, 3] Respondent contends that the provisions of section 853 of the Civil Code have no application here because of the relationship between the parties as disclosed by the

record. She cites and relies upon *Quinn v. Reilly*, 198 Cal. 465, 245 P. 1091, and *Miller v. Miller*, 82 Cal.App. 657, 255 P. 1099. We need not decide this question, for by its terms that section merely gives rise to a presumption that a trust results under certain circumstances. And even when such presumption arises, it may be rebutted by circumstances showing that the money was advanced as a loan (25 Cal.Jur. 187, § 55), or as a gift (25 Cal.Jur. 191, § 59). As above indicated, the circumstances in evidence in the present case were ample to rebut the presumption.

The portions of the judgment from which this appeal was taken are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



24 Cal.App.2d 649

In re JACOBS' ESTATE.

CONN v. WALDECK et al.
Civ. 2146.

District Court of Appeal, Fourth District,
California.

Feb. 1, 1938.

Hearing Denied by Supreme Court
March 31, 1938.

1. Wills ⇐163(6)

Nephews are not necessarily the "natural objects of bounty" of an aunt, as regards question whether will bequeathing property to legatees who were not related by blood to testatrix was unnatural so as to create inference that will was procured by undue influence.

[Ed. Note.—For other definitions of "Natural Object of His Bounty," see Words & Phrases.]

2. Wills ⇐163(2)

Even if beneficiaries under will occupied position of confidential relationship to testatrix, contestant was not relieved of burden of proving undue influence by preponderance of evidence where will was not necessarily either unjust or unnatural, beneficiaries did not know that testatrix was about to execute will prior to time she announced such intention a few minutes before testatrix dictated will, and beneficiaries were testatrix' friends and assisted and cared for her at the close of her life.

3. Wills ⇐166(1)

The fact that beneficiaries were present at invitation of testatrix at time she dictated and executed will was not sufficient to establish undue influence.

4. Wills ⇐166(5)

The evidence was insufficient to establish that will was procured by undue influence on part of beneficiaries or any other person, notwithstanding the beneficiaries were merely friends of testatrix who had nephews.

5. Wills ⇐386

On appeal from judgment refusing to revoke the probate of a will, appellate court is only required to consider the evidence favorable to proponents which was adopted by trial judge as true.

6. Wills ⇐302(1)

Evidence sustained finding that testatrix had made sufficient publication of will, had requested witnesses to subscribe their names to will, and that subscribing witnesses signed will in testatrix' presence. Probate Code, § 50, subds. (2-4).

7. Wills ⇐117

Even if subscribing witness was on a screen porch looking into testatrix' bedroom when will was prepared, read to testatrix and subscribed, witness was in testatrix' presence where witness was but a few feet from testatrix and within sight and hearing of her. Probate Code, § 50, subds. (2-4).

8. Evidence ⇐599

In will contest, the trial judge was not bound to accept as true beneficiaries' testimony even if their testimony tended to indicate that will was not subscribed by witness in presence of testatrix and disregard conflicting testimony of subscribing witnesses, since beneficiaries were only giving a narrative account of the events as they remembered them. Probate Code, § 50, subds. (2-4).

9. Appeal and error ⇐110

An attempted appeal from order denying motion for new trial was dismissed.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Proceedings in the matter of the estate of Isabella Jacobs, deceased, wherein R. N. Conn filed a contest proceeding against V. O. Waldeck and others to revoke the pro-

bate of the will. From an adverse judgment, the contestant appeals.

Affirmed.

William H. Wylie, of San Diego, and S. T. Hankey, of Los Angeles, for appellant.

Fred E. Lindley, and J. L. Hofflund, both of San Diego, for respondents.

MARKS, Justice.

This is an appeal from a judgment refusing to revoke the probate of the will of Isabella Jacobs, deceased. Her only surviving heirs at law are two nephews, one of whom is the contestant R. N. Conn. V. O. Waldeck, Margarete K. Waldeck, his wife, and Pearl Gotham are the legatees named in a will of deceased executed on August 5, 1935, and the San Diego Trust & Savings Bank is the executor. None of the legatees were related by blood to Mrs. Jacobs.

Mrs. Jacobs was about eighty-three years of age at the time she executed the will. She had suffered a hemorrhage of the brain about five years before and another slight one on August 1, 1935. On August 5, 1935, she was ill in bed but seemed to be mentally alert and in possession of her mental faculties.

The second amended petition to revoke the probate of the will alleged three grounds of contest: (1) Mental incapacity; (2) undue influence of V. O. Waldeck; (3) failure to observe the required formalities in the execution of the will.

The evidence of the mental testamentary capacity of Mrs. Jacobs was so complete and convincing that contestant abandoned it as a ground of contest at the trial and does not raise it here.

Evidence of undue influence on the part of V. O. Waldeck or any other person is entirely lacking. This is tacitly admitted by contestant, who is driven to rely upon the inference of undue influence which may be drawn from the following: An unnatural or unjust will, and a confidential relationship between the testatrix and a beneficiary who actively participated in the preparation of the will through which he unjustly benefited.

[1] It does not necessarily appear from the evidence that the will was either unnatural or unjust. Nephews are not necessarily the natural objects of the bounty of an aunt. While the beneficiaries were not related by blood to Mrs. Jacobs, they were her friends. They were kind to her and

assisted and cared for her at the close of her life. Mrs. Gotham voluntarily acted as one of her nurses during her last illness. There is no showing of any friendly relationship existing between either of the nephews and Mrs. Jacobs. As far as the record discloses, she might never have known of their existence.

A similar question was before the court in *Re Estate of Easton*, 140 Cal.App. 367, at page 376, 35 P.2d 614, 619, where it was said:

"Contestants contend, however, that in any event the evidence is sufficient to establish a confidential relationship between Lucy Hartnett and the testatrix, which gave rise to a presumption of undue influence legally sufficient to create a conflict in the evidence and thus sustain the verdict. We are unable to sustain this contention. The legal doctrine sought to be invoked is stated in *Re Estate of Lances*, 216 Cal. 397, 14 P. 2d 768, as follows: 'Where one who unduly profits by a will sustains a confidential relationship to the testator and actively participates in procuring the execution of the will, the burden is upon him to show that the will was not induced by his undue influence. In *re Estate of Shay*, 196 Cal. 355, 363, 237 P. 1079; In *re Estate of Gallo*, 61 Cal.App. 163, 214 P. 496.' But, as indicated by the foregoing statement, such presumption is not generated alone by the existence of a confidential relationship. In *re Estate of Presho*, 196 Cal. 639, 238 P. 944. Such relationship 'assumes probative importance when disclosed in conjunction with the facts that the provisions of the propounded instrument are unnatural or unjust, and that the alleged wrongdoer was active in procuring the writing to be executed. If the facts of injustice and activity on the part of the wrongdoer are not established, a denial of probate cannot be sustained.' 26 Cal.Jur. 652, citing authorities. In other words, to use the language of the Supreme Court: 'There must in addition be proof that the one occupying such relationship displayed activity in the preparation of the will to his undue profit' (*In re Estate of Presho*, supra), meaning that there must be proof that the will is unnatural. Moreover, it is well settled that collateral heirs, such as brothers and sisters, are not 'natural objects of bounty' as that term is used in the interpretation of wills, and therefore, in cases such as this, where the next of kin are collaterals and one or more are unprovided for in the will, the

pretermitted persons, in order to establish that the instrument is unnatural, must show affirmatively that they had peculiar or superior claims to the decedent's bounty; and, if no such claim is adduced, the instrument cannot be held to be unnatural. 26 Cal.Jur. 695, 696."

[2] If we assume, without holding, that the beneficiaries under the will occupied a position of confidential relationship to Mrs. Jacobs, still, under the circumstances before us, contestant would not be relieved of the burden of proving undue influence by a preponderance of the evidence. In re Estate of Prescho, 196 Cal. 639, 238 P. 944; In re Estate of Shay, 196 Cal. 355, 237 P. 1079; In re Estate of Ross, 117 Cal. App. 574, 4 P.2d 164.

[3,4] The will was not necessarily either unjust nor unnatural. None of the beneficiaries knew that Mrs. Jacobs was about to execute a will prior to the time she announced such an intention a few minutes before Dr. Crawford was called to write it. In calling Dr. Crawford, one of the proponents merely transmitted a message given by Mrs. Jacobs. The will was dictated by the testatrix to Dr. Crawford, who reduced the dictation to writing. Mrs. Jacobs fully understood the bequests which she made. She selected her beneficiaries. She was satisfied with the will she dictated. While the beneficiaries were in the room during the time the will was being dictated, written, and executed, they were not there as actors but as passive observers. They were present because Mrs. Jacobs wanted them there. Simply because they were present at the invitation of the testatrix at that time is not sufficient to establish undue influence. The evidence not only fails to show any undue influence on the part of Waldeck or any other person, it negatives any idea of undue influence. In re Estate of Ross, supra.

Contestant maintains that the evidence fails to show due execution of the will in the following particulars: (1) That the testatrix did not subscribe the will or acknowledge its subscription in the presence of both attesting witnesses; (2) that the testatrix did not declare to the witnesses that it was her will; (3) that the subscribing witnesses did not sign the will at the request of testatrix and in her presence. Subdivisions (2, 3, and 4), section 50, Probate Code.

[5] The evidence favorable to proponents, which is all we need consider here as it was adopted by the trial judge as true, may be summarized as follows: That on the evening of August 5, 1935, Pearl Gotham was caring for Mrs. Jacobs pending the arrival of the regular nurse; that Mrs. Jacobs said she wanted to make her will and asked that Dr. Crawford, her physician, be called to write the will; that she was told of the necessity for witnesses; that when witnesses were discussed one of the proponents said, "We might get Mr. Dixon, will that be all right?" to which Mrs. Jacobs replied, "Yes, that will be all right"; that Mr. Dixon, a neighbor, was called. Mr. Dixon described the events as follows:

"A short time after I stepped in Mrs. Jacobs' room, Dr. Crawford came; I was standing at, the foot of her bed, about three feet back, I should say; Mrs. Jacobs was talking to the doctor about a will, and she asked him to make it out; I think that is the words she used; not too sure; but I think that is it; it is rather hazy; the doctor procured a piece of paper, and the doctor asked her what she wanted said, and the doctor wrote the will—a short document; after Dr. Crawford wrote the will, he read it to Mrs. Jacobs; Mrs. Jacobs then said, 'That is all right; I will sign it;' she signed it; the doctor handed her the paper back and gave her his fountain pen and she signed it; I saw her; I moved a little further back towards the door that is mentioned here, but I saw her sign the will; after that Dr. Crawford reread the will, and then came to the foot of the bed and asked me to go to the little table that was there, and we both signed the will; at this table; this table was just through a door in another room; it was a full size door, and the table was right in front of the door; very close to the door; I could see Mrs. Jacobs; she was then sitting up in bed; after the doctor signed the will we both got up from the table; I turned around in the doorway, and the doctor took the document to Mrs. Jacobs and read it; she said, 'that is all right'; Doctor read it in full, with the names of the witnesses; Mrs. Jacobs said 'that is all right' or words to that effect, that is the best I can remember; when that occurred I was standing in the doorway ready to go; I left the house immediately. * * *

Contestant does not contend that Mrs. Jacobs signed the will out of the presence

of Dr. Crawford, one of the subscribing witnesses. Dr. Crawford wrote the will and testified that she dictated it to him; that he read it over to her after it was reduced to writing; that she said, "Yes." "Thank you." Both subscribing witnesses testified the will was signed by Mrs. Jacobs in their presence.

[6] Evidence weaker than that which we have here has been held to constitute (1) a sufficient publication of a will by the testatrix; (2) a sufficient request to the witnesses to subscribe their names to the will as witnesses; and (3) a sufficient subscription of the will by the witnesses in the presence of the testatrix. In re Estate of Silva, 169 Cal. 116, 145 P. 1015; In re Estate of Cullberg, 169 Cal. 365, 146 P. 888; In re Estate of Dow, 181 Cal. 106, 183 P. 794; In re Estate of Offill, 96 Cal. App. 640, 274 P. 623; In re Estate of Miner, 105 Cal.App. 593, 288 P. 120.

[7] There is some conflict in the evidence caused by the testimony of the beneficiaries of the will who placed Mr. Dixon on a screen porch looking into the bedroom where Mrs. Jacobs lay while she was giving directions for the terms of her will, while Dr. Crawford was writing it and while he was reading it for the first time, and when it was subscribed. According to these witnesses, the bedroom was small and Mr. Dixon was but a few feet from Mrs. Jacobs during this time and within sight and hearing of her. This does not create a substantial conflict in the evidence that could affect the results, as under the holding in Re Estate of Miner, supra, he was then in her presence.

[8] Assuming that this evidence did create a substantial conflict, the trial judge was not bound to accept the testimony of the beneficiaries as true and disregard the evidence of Mr. Dixon, as the proponents were only giving a narrative account of the events as they remembered them. A similar contention was made in the case of Johnson v. Johnson, 137 Cal.App. 701, 31 P.2d 237, 239, where it was said:

"It is argued that the respondent is bound by his own testimony, that this testimony is essentially the same as that given in support of this appellant's theory, and that the respondent may not recover against this appellant regardless of any other evidence which appears.

"It may first be observed that while it has usually, if not always, been held that the

rule contended for applies where a party to an action testifies to some fact peculiarly within his own knowledge or where he makes an admission, there is very good authority for refusing to apply the rule in a case where a party, instead of making an admission or testifying as to a fact peculiarly within his knowledge, is merely giving a narration of how something occurred as the same appeared to him. Hill v. West End St. Ry. Co., 158 Mass. 458, 33 N.E. 582; Whiteacre v. Boston Elevated Ry. Co., 241 Mass. 163, 134 N.E. 640; Kanopka v. Kanopka, 113 Conn. 30, 154 A. 144, 80 A.L.R. 619. * * * Under any theory of the case, the question was one of fact for the jury."

The proponents of the will urge other reasons why the judgment must be affirmed. In view of what we have already said, it is unnecessary to consider them.

[9] The attempted appeal from the order denying the motion for a new trial is dismissed. The judgment is affirmed. Respondents will recover their costs of appeal.

I concur: BARNARD, P. J.



24 Cal.App.2d 681

**NEW et al. v. MUTUAL BENEFIT
HEALTH & ACCIDENT ASS'N.**

Civ. 5875.

District Court of Appeal, Third District,
California.

Feb. 2, 1938.

1. Pleading $\hookrightarrow$ 8(1)

"Ultimate facts" are the logical conclusions deduced from certain primary facts, evidentiary in character, and "conclusions of law" are those presumptions or legal deductions which, the facts being given, are drawn without further evidence.

[Ed. Note.—For other definitions of "Conclusion of Law" and "Ultimate Fact," see Words & Phrases.]

2. Pleading $\hookrightarrow$ 8(1)

The allegation of an asserted fact which is stated in the form of a conclusion is

sufficient in the absence of a special demurrer, but is inadequate when the recited facts upon which it depends fail to support the conclusion.

3. Pleading ⚡8(6)

In action on a health and accident policy, a complaint alleging that policy unlawfully attempted to limit the insurer's liability in event of loss of life within the first policy year was insufficient for failure to state the ultimate facts in that only questions of law were raised which court could determine from the law as applied to the policy as set out, and not from any evidence outside the complaint.

4. Insurance ⚡467

A provision in a health and accident policy against liability for death occurring during the first policy year was not invalid as vitiating the consideration for which a premium was paid, where policy also provided benefits for sickness, disability caused by accident or disease, and specified losses of bodily members.

5. Insurance ⚡467

A provision in a health and accident policy against liability for death occurring during the first policy year was not invalid as an "exception" in the policy, as provision constituted an exclusion of a risk.

[Ed. Note.—For other definitions of "Exception," see Words & Phrases.]

6. Insurance ⚡467

A provision in a health and accident policy against liability for death occurring during the first policy year was not invalid as a "limitation of indemnity" in violation of statute or as a "reduction of an indemnity," as it entirely excluded a risk. St. 1935, pp. 643, 649, 651, §§ 10310, 10360, 10390.

[Ed. Note.—For other definitions of "Indemnity," see Words & Phrases.]

7. Insurance ⚡146(1)

When a policy provides for certain risks for which the insurer shall or shall not be liable and provides no exceptions, the conclusive presumption is that none were intended.

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Action by Vera New and another against the Mutual Benefit Health & Accident Association, to recover benefits under an in-

surance policy issued by the defendant. Judgment sustaining a demurrer to the first cause of action alleged in the complaint, and the named plaintiff appeals.

Affirmed.

W. Coburn Cook and Gilbert Moody, both of Turlock, for appellant.

Decoto & St. Sure, of Oakland, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Vera New, appellant herein, the widow of Lavon B. New, together with the special administrator of the estate of New, deceased, brought this action against the Mutual Benefit Health & Accident Association, a corporation, to recover certain benefits under an insurance policy written by the defendant.

Two causes of action are set out in the complaint. In the first the widow asks for the \$2,000 death benefit provided by the policy. In the second cause of action the special administrator asks for disability and hospital benefits. Defendant interposed a general demurrer to each of the causes of action. The court sustained the demurrer to the first cause of action without leave to amend, and from the judgment upon that order, plaintiff Vera New has taken this appeal.

The complaint discloses that on April 1, 1935, for a premium of \$25 in advance, and \$15 quarterly thereafter, defendant issued the policy here in question. The insured paid the advance premium of \$25 upon delivery of the policy, and on May 1, 1935, paid the quarterly premium of \$15. On June 23, 1935, the insured received bodily injuries through accidental means, which caused his death.

The appellant sets forth in her complaint the policy sued upon, and claims that it contains a provision which attempts to limit the liability of the defendant in the event of loss of life within the first policy year, and alleges such provision to be without consideration, inequitable, and in violation of the laws of the state of California, in its contents, form, placement, and type.

The policy provides as follows:

"Part A. Specific Losses.

"If the insured shall, through accidental means, sustain bodily injuries as described in the Insuring Clause, which shall, independently and exclusively of disease and all other causes, immediately, continuous-

ly and wholly disable the Insured from the date of the accident and result in any of the following specific losses within thirteen weeks, providing in case of loss of life the policy shall then have been continuously in force more than year, the Association will pay: * * * For Loss of Life * * * \$2,000.00. * * *

To overcome the apparent limitation set forth above requiring that in case of loss of life the policy shall have been continuously in force more than one year, appellant alleges in paragraph VI of her complaint: "That said policy of insurance contains a provision unlawfully attempting to limit the liability of the defendant in the event of loss of life within the first policy year. That said provision was placed in said policy without consideration and in contravention of the laws of the State of California, of the terms of the policy, and of the express contract of the defendant and the insured whereby the latter paid a premium for insurance, as stated in the policy, against loss of life caused by accident within the period the said policy was in force. That said provision is inequitable, unjust, lacks mutuality, and is an attempted forfeiture of the benefit for loss of life with the forfeiture based upon the occurrence of the very event to which the benefit applies. That said provision does not comply with the laws of the State of California for policies of insurance in its contents, form, placement, nor type, and is void and does not provide an exception to the liability of the defendant."

Upon demurrer the trial court held that the foregoing paragraph VI stated only conclusions of law drawn from the policy itself, in that the only question the court was called upon to determine was whether the policy on its face was, as a matter of law, defective in the particulars alleged in said paragraph, and accordingly sustained the demurrer.

[1] The distinction between conclusions of law and statements of fact is at times difficult to distinguish. The difference between the two are stated in 21 California Jurisprudence 28, as follows: "Ultimate facts have been defined as the logical conclusion deduced from certain primary facts evidentiary in character, and conclusions of law are those presumptions or legal deductions which, the facts being given, are drawn without further evidence."

[2,3] Applying this definition to the paragraph in question, it would appear that the only proof that could be offered in support of the allegations of the foregoing paragraph would be the contract of insurance itself, which is made a part of the complaint. It would then appear that the allegations in paragraph VI are questions of law which the court would have to determine from the law as applied to the policy, and not from any evidence outside of the complaint.

The rule applicable to such pleading as here involved is stated in *Miles v. McFarlane*, 104 Cal.App. 513, 286 P. 507, 509, to the effect that while the allegation of an asserted fact which is stated in the form of a conclusion would be sufficient in the absence of a special demurrer, it is inadequate when the recited facts upon which it depends fail to support the conclusion. There the allegation in regard to the reversion of title was based upon the assumption that it occurred "under the terms of the contract." The contract was made a part of the complaint and contained no provision for a forfeit or default in payment of installments. The court then held that the complaint therefore failed to allege title or right of possession in the selling corporation. It would seem, therefore, that here the allegations of the complaint are insufficient, in that it fails to state the ultimate facts.

[4] Appellant next claims the provision in the policy is invalid as a matter of law. She contends that the assured lost his life by accident within the terms of the policy, and that the defendant refused to pay the indemnity solely because such loss of life occurred within the first policy year. This claim is based upon the construction placed upon the policy by the plaintiff that the policy covered the contingency of death occurring within the first year. However, an examination of the policy makes clear that the insured paid his premium for a policy of accident and health insurance for the first year, and that the company made no promise to pay for the loss of life during the first year, and expressly covered protection from loss by sickness or accident only and no more, during that specified period; the primary purpose being to pay to the insured specific benefits in the event of disability caused by reason of accident or disease, the death benefit being an incidental provision, and definitely by the

terms of the policy not made effective during the first year.

According to the interpretation of plaintiff, the death benefit was the only protection in the policy, and she claims that inasmuch as this risk was not covered for the first year, the insured received nothing for his money. One has but to look at the policy, however, to find that during the year the assured was protected against the loss of one or both of his eyes, his hands, or his feet, as well as for the loss of time through total or partial disability caused by accident or disease, and the benefit of hospitalization if such contingency arose.

Observation and insurance practice teaches that persons who are about to engage upon duties more dangerous than those to which they have been formerly accustomed are likely to take out policies of insurance, which is one reason that insurance companies are justified in charging larger premiums for smaller risks during the first year of the policy than during the subsequent years.

Plaintiff argues that under the policy the company could collect a large premium for the first year and then cancel the policy, thereby causing a loss to insured. But in consideration of the premium for the first year the insured received coverage for that year for loss due to sickness or accident, and if the policy should be canceled at the end of the first year he has received all of the protection for which he paid.

[5] Plaintiff claims that the omission of the death benefit is an exception in the policy, but an examination of the policy itself seems to indicate that the provision for refusing to pay the death benefit in the first year is in the nature of an exclusion of a risk.

[6] Plaintiff also contends that the provision which limits recovery for death until the policy has been in force one year is void as it violates various provisions in the Insurance Code, and in particular the provisions of the Insurance Code, §§ 10360, 10310, 10390, St. 1935, pp. 649, 643, 651.

Section 10360 provides that if a disability policy, issued in this state, shall contain a provision limiting the amount of indemnity to a sum less than the amount stated in the policy, such provision shall be set forth in the words and figures and in the order specified in subsequent sections.

Section 10310 provides that no disability policy shall be issued or delivered in this state if it purports by reason of the circumstances to reduce any indemnity to an amount less than that provided for under ordinary circumstances unless such portion is printed in boldface type and given greater prominence than any other portion of the text of the policy.

And section 10390 declares that if a policy is issued in violation of the provisions of the Insurance Code, the same is valid, but the policy shall be read and construed as provided by the Code, and in any conflict in the provisions of the policy and the Code, the Code shall control.

But we find no conflict with or violation of the Code in the terms of the policy before us. The disputed portion of the policy rather than being a limitation of the promised indemnity is an integral part of the provision itself, and therefore cannot come within the prohibition of section 10360.

So, also, in regard to the provisions of section 10310, the same reasoning applies. The disputed provision does not reduce an indemnity, but entirely excludes a risk.

In *Kirkby v. Federal Life Ins. Co.*, 6 cir., 35 F.2d 126, suit was brought by a beneficiary after death of insured, caused by asphyxiation from inhaling gas from the exhaust of his motor. The policy agreed to pay for loss of life caused by specific enumerated causes, of which asphyxiation was not one. It was claimed that the policy could not be so limited because the limitations were not set forth in conformity with the statute, which provided that any portion of the policy which purported, by reason of circumstances, to reduce any indemnity, shall be printed in boldface type.

The court held that parties could contract for whatever risks they wished to, and if no uncertainty or ambiguity was found courts could not create one.

So here the company made no promise to pay the beneficiary any sum whatever in the event of the death of the insured within one year of the issuance of the policy, the only promise being to pay the beneficiary in the event of death occurring after one year, and thereby definitely excluding such risk during the first year of the policy. It is not a stipulation limiting the amount of indemnity to a lesser amount to be paid for a risk included in the agree-

ment, as the risk of death was in no manner a part thereof. The promise definitely was to pay for death only after one year.

No interpretation of this provision has been found in the California reports, but we are referred to *First Texas Prudential Insurance Co. v. Smallwood et al.*, Tex. Civ.App., 242 S.W. 498. The laws of Texas contain a provision similar in effect to our Insurance Code, and in that case the court reached a conclusion in accordance with our construction of section 10360 of the Insurance Code.

[7] In *American Nat. Ins. Co. v. Walker*, Tex.Civ.App., 256 S.W. 950, 952, also a Texas case, the court said, "Here the face of the policy provided that, if the insured died within six months from the date of the policy, the benefit was limited to \$123. The contract is one which the parties had a legal right to make. It does not contravene any statute or rule of public policy. We conclude that the court did not err in ruling upon that question," and when the contract provides for certain risks for which the company shall or shall not be liable, and have made no exceptions, the conclusive presumption is they intended none. To the same effect is *Hopkins v. Connecticut General Life Ins. Co.*, 225 N. Y. 76, 121 N.E. 465; *Drogula v. Federal Life Ins. Co.*, 248 Mich. 645, 227 N.W. 692.

For the foregoing reasons the judgment from which this appeal is taken must be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.



24 Cal.App.2d 659

SHUTZ v. WESTERN WHOLESALE LIQUOR DISTRIBUTORS et al.

Civ. 2104.

District Court of Appeal, Fourth District,
California.

Feb. 1, 1938.

Hearing Denied by Supreme Court
March 31, 1938.

1. Appeal and error ⇨607(1)

A failure to request a reporter's transcript within statutory period does not require dismissal of proceedings for preparation and settlement thereof, but transcript

may be considered if it has been certified, since trial judge's certification is deemed equivalent to granting of relief from default. Code Civ.Proc. § 473, as amended by St.1933, p. 1851; § 953a, as amended.

2. Appeal and error ⇨607(1)

The trial court may grant relief from delay in preparation of a reporter's transcript on a proper showing and the power should be liberally exercised, although it is largely within the trial court's discretion.

3. Appeal and error ⇨939

The action of the trial court with respect to delay in preparation of a reporter's transcript will not be reversed on appeal, unless an abuse of discretion appears from the record.

4. Appeal and error ⇨712

On appeal from an order dismissing proceedings for the preparation and settlement of reporter's transcript in connection with a prior appeal in the same action, contention of respondent which was not set forth in the affidavit upon which hearing in trial court was held, and which was based on facts which were not before the trial court, would not be considered by the appellate court.

5. Appeal and error ⇨607(1)

The entry of an order dismissing proceedings for the preparation and settlement of a reporter's transcript in connection with a prior appeal in the same action because of delay was authorized, notwithstanding appellant's alleged financial inability to raise funds for transcript's preparation, in absence of showing that appellant attempted to secure additional time, or that he was unable to furnish an undertaking, or that he attempted to prepare a bill of exceptions. Code Civ.Proc. § 953b.

6. Appeal and error ⇨607(1)

An appellant, in opposing a motion to terminate proceedings for preparation and settlement of a reporter's transcript, in spite of his delay in preparation thereof must make some showing as to the questions he desires to have reviewed upon his appeal, and as to the necessity for a reported transcript. Code Civ.Proc. § 473, as amended by St.1933, p. 1851.

7. Appeal and error ⇨607(1)

An injured party was not entitled to relief from order dismissing proceedings for preparation and settlement of reporter's

transcript because of delay of over a year in preparation thereof merely because another in a separate action had recovered damages arising out of the same accident, since opposite judgments in such a situation were not necessarily inconsistent, and injured party was required to show that requested relief from default would benefit him.

Appeal from Superior Court, Riverside County; George R. Freeman.

Action by Nathan Shutz against the Western Wholesale Liquor Distributors and others, for injuries sustained in an automobile collision. From an order dismissing proceedings for preparation and settlement of reporter's transcript in connection with a prior appeal, the plaintiff appeals.

Affirmed.

Harry J. Miller, of Los Angeles, Sarau & Thompson, of Riverside, and Overton, Lyman & Plumb, of Los Angeles, for appellant.

Leonard J. Difani, of Riverside, and Byrne & Coughlin, of San Bernardino, for respondents.

BARNARD, Presiding Justice.

This is an appeal from an order dismissing and terminating the proceedings for the preparation and settlement of the reporter's transcript in connection with a prior appeal in the same action.

The plaintiff, while riding as a guest in an automobile driven by one Tarshish, was injured in a collision between that car and one owned and operated by the defendants. The plaintiff brought this action for damages which was tried before a jury in March, 1935, resulting in a verdict and judgment in favor of the defendants. A motion for a new trial was denied and notice thereof served on the plaintiff on May 9, 1935. On May 22, 1935, the plaintiff served and filed a notice of appeal from the judgment, together with a notice and request for the preparation of a clerk's and reporter's transcript. By stipulation the time for the preparation and filing of these transcripts was extended to September 1, 1935.

On July 25, 1936, the plaintiff requested the court reporter to prepare a reporter's transcript in this action. On August 7, 1936, a clerk's transcript was filed in the

trial court and delivered to the clerk of this court on September 12, 1936. On August 17, 1936, a reporter's transcript, duly certified by the court reporter, was filed in the trial court. On August 19, 1936, the defendants served and filed objections to the certification of the reporter's transcript on the ground that the time for the preparation and filing thereof had expired on September 1, 1935, and that the plaintiff had not used due diligence in causing the same to be prepared. On the same day the defendants served and filed a notice of motion to terminate and dismiss the proceedings for the preparation of a reporter's transcript. The matter was heard on affidavits, those for the defendants setting forth the material facts above referred to with the further statement that the time for the preparation of a transcript had not been extended beyond September, 1935, and those for the plaintiff setting forth in great detail facts tending to show that the plaintiff had been, throughout the period of the delay, without funds, that on many occasions during the fall and winter of 1935 and the spring and summer of 1936, he had unsuccessfully attempted to borrow from numerous persons funds with which to prepare said transcripts, that near the end of July, 1936, he had secured from a named individual funds for this purpose and had had the transcripts prepared, and that in March, 1936, Tarshish secured a judgment in a separate action, tried before a different judge and without a jury, which was paid by these defendants. After a hearing the court granted the motion to terminate and dismiss the proceedings for the preparation of a record on the ground that the plaintiff had not used due diligence in connection therewith, and the plaintiff has appealed from that order.

[1] The sole ground of appeal is that the court abused its discretion in making this order. In addition to the matter of the delay in the preparation of a transcript the respondents contend that the failure of the appellant to request a typewritten transcript within ten days after notice of the order denying a new trial is in itself sufficient to sustain the order made. In the earlier cases it was held that a transcript could not be considered where a request for the same was not filed within the time prescribed by section 953a of the Code of Civil Procedure, as amended. This rule has since been modified and now the act of certification by the trial judge is taken as equivalent to the granting of

relief from default under section 473 of that Code, as amended by St.1933, p. 1851.

[2,3] With respect to the delay in the preparation of such a transcript it is now well settled that the trial court has the power to grant relief on a proper showing that this power should be liberally exercised, that the matter is necessarily one which is largely within the discretion of the trial court, and that unless an abuse of that discretion clearly appears from the record the order of the court will not be reversed on appeal. *Wilson v. Wilson*, 207 Cal. 364, 278 P. 440; *Wood v. Peterson Farms Co.*, 131 Cal.App. 312, 21 P.2d 468; *Western Concrete Pipe Co. v. Grabovich*, 118 Cal.App. 367, 5 P.2d 71; *O'Banion v. California C. P. Growers*, 109 Cal.App. 328, 292 P. 975; *Sherriffs v. Scott*, 109 Cal. App. 438, 292 P. 1088; *Kammerer v. Marino*, 66 Cal.App. 720, 226 P. 980.

[4,5] Assuming that the court could well have refused to terminate these proceedings under the showing here made that the appellant had been without funds, that he had made a considerable effort to secure funds for the purpose, and that he had eventually been successful and had actually caused the transcript to be prepared before the motion to terminate the proceedings was made, it does not follow that a contrary conclusion discloses an abuse of discretion. The matter was delayed for considerably more than a year and for almost a year after a stipulated extension of time had expired. There is some ground for the contention here made by the respondents that the circumstances indicate that the appellant had in fact abandoned his appeal, and that he later attempted to renew the same after the success of the plaintiff in the other action. The respondents argue that they were prejudiced by this delay, since they settled and paid the Tarshish judgment in reliance upon a belief that the appellant had abandoned his appeal and that they would not have done so had they known that such was not the case. This contention need not be considered here, since these facts were not set forth in respondents' affidavits and were not before the trial court, so far as this record shows. There are a number of facts, in addition to the length of the delay, which support the court's conclusion that due diligence had not been used in preparing the desired record. There was no showing that the appellant could not have procured the necessary funds at an earlier date

from the same person from whom he eventually secured them. So far as shown by the record, he did not ask for additional time either from the court or from the respondents and he did not attempt to make any arrangements with the reporter as permitted by law. There is no showing that he was unable to furnish an undertaking, as provided for in section 953b of the Code of Civil Procedure, and none that he attempted to prepare a bill of exceptions or that he was unable to do so. He could have obtained from this court an order permitting him to file a typewritten bill of exceptions which he did in connection with the present appeal. In our opinion it cannot be said, upon the record before us, that an abuse of discretion appears.

[6,7] A further consideration is that the appellant, in opposing the motion to terminate the proceedings, was in fact asking for relief under section 473 of the Code of Civil Procedure, and there should have been some showing as to what questions he desired to have reviewed upon his appeal, and as to the necessity for a reporter's transcript in order to properly present such questions. In *Kammerer v. Marino*, supra, it was pointed out under somewhat similar circumstances that it was not possible to hold that the trial court had abused its discretion in the absence of any showing that the desired transcript would be of benefit to the party seeking relief. No such showing was here made, although the appellant set forth in his affidavit that Tarshish had recovered damages against these respondents on account of injuries received in the same automobile accident, and that it would be an injustice to permit a different result in this action. It is argued that two opposite judgments arising from the same automobile accident in this manner should not be permitted to stand, and in support thereof the cases of *Inyo Chemical Co. v. City of Los Angeles*, 5 Cal.2d 525, 55 P.2d 850, and *Southern Pacific Co. v. Los Angeles*, 5 Cal.2d 545, 55 P.2d 847, are cited. The observations of the court in the last-mentioned case, which is particularly relied upon by the appellant here, are directed to a situation where the essential facts are similarly presented in two different actions and are to a large extent undisputed. It cannot be told from the record before us whether such a situation exists here. The essential facts may have been presented in the Tarshish case and in this case in a very different manner, and may have been largely disputed

in one and practically admitted in the other. Automobile accident cases usually involve disputed questions of fact which of necessity are for the court or jury. In such cases it is entirely possible that opposite judgments may be entered in separate actions for damages arising out of the same collision which will have to be sustained because of the evidence presented in the respective cases. The judge who made the order here appealed from also presided at the trial of the action and was familiar with the facts. The fact that another judgment was entered in another case is not conclusive and the circumstances peculiarly called for some showing on the part of the appellant, who was asking for relief, that the relief requested would or might be of benefit to him. No attempt to make any such showing appears in the record.

For the reasons given, the order appealed from is affirmed.

I concur: MARKS, J.



In re PATERSON'S ESTATE.*

BLAKELY et al. v. LODER et al.

Civ. 10643.

**District Court of Appeal, First District,
Division 1, California.**

Jan. 28, 1938.

Rehearing Granted Feb. 26, 1938.

1. Appeal and error ⇨766

Under amended court rule, the District Court of Appeal may not dismiss appeal for failure to print in the briefs the substance of such parts of the typewritten record as are relied upon with parenthetical references to the line and page of the typewritten transcript, but may order the omission to be supplied. Code Civ.Proc. § 953a, as amended by St.1937, p. 476; Rules of the Supreme Court, rule 8, §§ 3, 4.

2. Courts ⇨82

The District Court of Appeal will not in all cases enforce its rules but will retain discretion in exacting compliance.

3. Courts ⇨82

Where question raised by appeal was one theretofore not decided in the state, and respondents had not been misled nor prejudiced by appellants' alleged noncompliance with rules nor appellate court inconvenienced thereby, appeal was considered on its merits rather than dismissed for such noncompliance. Rules of the Supreme Court, rule 8, §§ 3, 4.

4. Descent and distribution ⇨1

The right of succession is not a natural right but is created and regulated by law.

5. Escheat ⇨4

The right of succession is invariably confined to those of the blood of the decedent, to adopted children, or to the surviving spouse, and the estate will not escheat to the state so long as there is a person of that blood in existence to receive the estate.

6. Descent and distribution ⇨6

The statutes relating to succession are founded on the common law as it existed when adopted by statute so far as it was suitable to existing conditions.

7. Bastards ⇨100, 104

Under the common law, an illegitimate person was without capacity to inherit or transmit the estate of one relative to another.

8. Descent and distribution ⇨21

Under the common law, the persons to whom an estate descends are described as the "next of kin" of the deceased, so that a person lacking capacity to inherit his estate is not his next of kin.

[Ed. Note.—For other definitions of "Next of Kin," see Words & Phrases.]

9. Bastards ⇨100, 104

Under the common law, an illegitimate grandmother could not inherit the estate of her legitimate grandson, although he could inherit her estate by representing his father or mother, issue of her body.

10. Bastards ⇨100

"Next of kin," as used in statute providing that if a decedent leaves neither issue, spouse, parent, brother, sister, nor descendant of a deceased brother or sister, the estate goes to the "next of kin" in equal degree, does not include a person of illegitimate birth. Probate Code, §§ 226, 255.

*For subsequent opinion see 93 P.2d 825.

11. Statutes ⇨225

Section of Probate Code relating to descent, where deceased leaves neither issue, spouse, parent, or other designated relatives is in *pari materia* with section of Probate Code relating to inheritance of illegitimate children. Probate Code, §§ 226, 255.

12. Bastards ⇨104

Section of Probate Code enabling illegitimate child to inherit the estate of his parents and stating that he does not represent his parents by inheriting any part of the estate of the parent's kindred, unless he has been legitimated by his parents, was without application in determining the right of the decedent's cousins to inherit as his next of kin, where the maternal grandmother of decedent was an illegitimate daughter of the common ancestor of the decedent and alleged cousins. Probate Code, §§ 250, 255.

13. Bastards ⇨104

Section of Probate Code changing the common-law rule of the inheritance of the estate of an illegitimate was without application in determining right of cousins to inherit decedent's estate as his next of kin, where the maternal grandmother was an illegitimate daughter of the common ancestor of decedent and alleged cousins. Probate Code, § 256.

14. Bastards ⇨104

The incapacity of an illegitimate to take property by succession, except as authorized, renders the illegitimate incapable of transmitting such property. Probate Code, §§ 226, 250, 255, 256.

15. Bastards ⇨100

The statutory removal of part of an illegitimate's incapacity with reference to succession leaves the remainder unaffected. Probate Code, §§ 255, 256.

16. Descent and distribution ⇨28

The right to inherit by "representation," which takes place when the descendants of a deceased person take the same share or right in the estate of another that such deceased person would have taken as an heir if living, applies only to the estate of an ancestor or ancestor's kindred. Probate Code, § 250.

[Ed. Note.—For other definitions of "Representation," see Words & Phrases.]

17. Statutes ⇨239

Statutes in derogation of the common law are to be liberally interpreted to effectuate their intent.

18. Bastards ⇨104

The common-law incapacity of an illegitimate grandmother to inherit the estate of her legitimate grandson has not been removed by statute. Probate Code, §§ 226, 250, 255, 256.

19. Bastards ⇨104

Where the maternal grandmother of deceased was an illegitimate daughter of the common ancestor of deceased and alleged cousins, cousins were not entitled to inherit deceased's estate as his "next of kin." Probate Code, §§ 226, 250, 255, 256.

20. Descent and distribution ⇨71(7)

In proceeding to determine the parties interested in an estate, a finding that the relationship of petitioners, "if any," was that of second cousins once removed did not constitute a finding thereon. Probate Code, § 1080.

21. Descent and distribution ⇨71(7)

In proceeding to determine the parties interested in an estate, where issue as to petitioners' relationship to deceased had been presented and was material, petitioners were entitled to a finding of fact thereon. Probate Code, § 1080.

22. Costs ⇨103

On appeal from a judgment rendered in a proceeding to determine the parties interested in an estate, wherein judgment was reversed because of illegitimacy of ancestor through whom respondents claimed, costs were ordered paid out of the assets of the estate. Probate Code, §§ 1080, 1232.

Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

Proceeding in the matter of the estate of Frank Paterson, deceased, by Norman L. Blakely and others to determine the parties interested in the estate, wherein Rosina Luise Loder, née Dick, and others filed statements alleging relationship and denying interest of the petitioners. From an adverse judgment, the petitioners appeal.

Reversed and remanded.

Rittenhouse & Rittenhouse and Bert B. Snyder, all of Santa Cruz, for appellants.

Wyckoff, Gardner & Parker, of Watsonville, for respondents.

PER CURIAM.

The probate of the above-named estate being pending in the superior court of Santa Cruz county, Norman N. Blakely, Samuel Blakely, and Margaret Daly filed a petition under the provisions of section 1080 of the Probate Code for an order determining who are interested in said estate, in which they alleged that they are second cousins once removed of the deceased. A time for hearing the petition being set and notice thereof given, Rosina Luise Loder, Marie Elise Pauli, and Rosina Ponte appeared and filed a written statement, setting forth that each is a first cousin of the mother of the deceased and a first cousin once removed of the deceased, and denying the interest of the petitioners. At the hearing both sets of claimants introduced their proof in the form of affidavits made by genealogical experts, detailing the respective family trees of the parties; no objection being made to the form of the proof. It showed the petitioners to be related to the deceased through his father, and their opponents to be related to him through his mother. From the proof it also appeared that the maternal grandmother of the deceased was an illegitimate daughter of Elizabeth Suter, the common ancestor of the respondents and the deceased.

The court made findings of fact and conclusions of law, by which it found that Rosina Luise Loder, Marie Elise Pauli, and Rosina Ponte are first cousins of the mother of the deceased, their relationship to the deceased being in the fifth degree, and that the relationship of the Blakelys and Daly to him, if any relationship exists at all, is that of second cousins once removed and is in the eighth degree. As conclusions of law the court found that the estate of the deceased descended to claimants Loder, Pauli, and Ponte, who each is entitled to an undivided one-third share. Judgment was entered accordingly, in which it was further decreed that the claims of the Blakelys and Daly be denied. These have appealed from the judgment.

The opening brief of the appellants contains a "Statement of the question on appeal," which, reduced to its simplest terms, is, Under the law of this state can

a grandmother, of illegitimate birth and not legitimated, succeed to the estate of her grandson of legitimate birth who dies intestate, leaving neither issue, spouse, parent, brother, sister nor descendant of a brother or a sister? The appellants then specify that the trial court erred in its conclusions of law and judgment that the estate of said grandson descended to the respondents and rejecting the claim of appellants. They then proceed to argue that question on the assumption that the evidence establishes the illegitimate relationship. The respondents point out that this is an attack on the findings of fact without any specification that they are not supported by the evidence; and that appellants have also failed to comply with rule VIII, section 3, of the Supreme Court, permitting the substance of such parts of the typewritten record as are relied upon—and which are required by section 953a, Code of Civil Procedure, as amended by St.1937, p. 476, to be printed in the briefs—to be stated in substance with parenthetical references to the line and page of the typewritten transcript. For lack of such specification respondents urge that the appeal is not entitled to consideration and that the judgment should accordingly be affirmed; and for failure to comply with said rule VIII the appeal should be dismissed under section 4 thereof.

[1] As to the latter it may be at once said that said section 4 has been amended since the taking of this appeal (effective November 4, 1937), as a consequence of which this court may no longer dismiss an appeal for such failure, but may order the omission to be supplied. The rectification has already been made by the appellants in their closing brief.

[2,3] As to the former, the appellants represent that by reason of the course which the proceedings in the trial court took they were led to believe that the illegitimacy of the person in question had been practically stipulated as a fact and, that being so, they were justified in proceeding to argue the appeal on that assumption and show that the conclusions of law and judgment were erroneous. The transcript of proceedings does not sustain the suggestion that such a stipulation was made, but it discloses some excuse for the assumption.

It is further urged by the respondents that the appeal ought not to be entertained for the reason that there is no finding that

the appellants are related to the deceased, and therefore they are not parties aggrieved who may appeal from the judgment. This situation has been met by the appellants by a specification of error made in the closing brief that the court failed to find upon that question, which was a material issue in the case. This relationship was also assumed by the appellants to have been agreed upon and they assert that the course of the proceeding at the trial misled them into taking that view.

This court will not, in all cases, enforce its rules; it retaining a certain discretion in exacting compliance with them, 2 Cal.Jur. 729; 1 Cal.Jur.Supp., 451. The respondents have not been misled nor, we think, prejudiced by the departure from them in this instance, as in their brief they have exhaustively and ably treated the question which the appellants purported to raise; nor has this court been inconvenienced by such departure. And, since the question attempted to be presented by the appeal is stated by the parties to be one which has not heretofore been decided in this state and to be an important one, we have concluded to consider the appeal upon its merits.

The first contention of the appellants, then, is that the undisputed evidence shows that Anna Maria Weyeneth, the maternal grandmother of the deceased, was the illegitimate daughter of Elizabeth Suter, the common ancestor of the decedent and the respondents, as the result of which illegitimacy the respondents cannot claim to be lawful next of kin of the deceased.

[4, 5] It is well settled that the right to succeed to the estate of a deceased person is not a natural right but one created and regulated by law, Estate of Watts, 179 Cal. 20, 175 P. 415, although it is true that its course of devolution is invariably confined to those of the blood of the decedent, to adopted children, or to the surviving spouse, and it will not escheat to the state so long as there is a person of that blood in existence to receive the estate.

[6-9] It is conceded that our statutes relating to succession are founded upon the common law as it existed when that law was by statute adopted bodily into the law of this state in so far as it was suitable to existing conditions here; and it is also conceded that by that law an illegitimate person was without capacity to inherit and, consequently, to transmit the estate of one relative to another. He was said to have no heritable blood and his only heirs were

those of his own body. The person or persons to whom the estate descends are described as the next of kin of the deceased, so that a person lacking capacity to inherit his estate is not his next of kin. Thus at common law the illegitimate grandmother involved in this case would not be capable of inheriting the estate of her legitimate grandson because not lawful next of kin, although he could inherit her estate by representing his father or mother, issue of her body. So that the question here involved is, By what statute of this state, if any, has this rule of the common law been changed?

[10-15] The subject of succession is dealt with by a number of sections of the Probate Code. The first one pertinent to this inquiry is section 226, formerly part of section 1386 of the Civil Code. It provides: "If the decedent leaves neither issue, spouse, parent, brother, sister, nor descendant of a deceased brother or sister, the estate goes to the next of kin in equal degree, excepting that, when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote."

It is seen that a grandparent is not designated specifically as entitled to succeed to the estate of a deceased person, but comes in under the provision that the estate goes "to the next of kin in equal degree." The term "next of kin" as here used does not include a person not of legitimate birth. Estate of Magee, 63 Cal. 414, 416. To construe it otherwise would be quite inconsistent with section 255 of the same Code, which is in pari materia and deals specifically with the rights of inheritance of illegitimate children, and which is the next provision of our statutory law to be considered in connection with the question before us.

Section 255 of the Probate Code provides that: "Every illegitimate child is the heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father; and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father or mother by inheriting any part of the estate of the parent's kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his

family; in which case such child is deemed legitimate for all purposes of succession."

It is seen that this section contains two provisions, first, an affirmative one, enabling an illegitimate child to inherit the estate of his mother and, under the conditions there stated, the estate of his father, and a negative one (designed to rebut an inference that might be drawn from the first) to the effect that he does not represent his father or mother by inheriting any part of the estate of the parent's kindred, unless he shall have been legitimated by his parents.

This section obviously has no application to the case before us, for there is not here involved the estate of either of the parents of the illegitimate nor the estate of kindred of either which Anna Maria Weyeneth, even if legitimate, could have inherited by representation (succession by right of representation taking place when the "descendants of a deceased person take the same share or right in the estate of another that such deceased person would have taken as an heir if living") Probate Code, § 250, since the estate here involved is that of a descendant and not of an ancestor or his collateral kindred. It therefore seems clear that the rights of succession of an illegitimate to the estate here involved are not affected in any respect by this section.

It is necessary to refer to a third section of the Probate Code, since an argument is based upon it that through its provisions the rights of succession of illegitimates are by implication enlarged. That section is 256, which reads: "The estate of an illegitimate child, who, having title to any estate not otherwise limited by marriage contract, dies without disposing thereof by will, is succeeded to as if he had been born in lawful wedlock, if he has been legitimated by a subsequent marriage of his parents or adopted by his father as provided by the Civil Code; otherwise, it is succeeded to as if he had been born in lawful wedlock and had survived his father and all persons related to him only through his father."

Here we have a change in the common-law rule of succession by giving to the parents of an illegitimate child and to their kin, if he has been legitimated, and to the mother and her kindred alone if he has not been, the right to succeed to his estate as if he had been born in lawful wedlock; but the change is limited by the terms of the section to the estate of an illegitimate, with which, as before remarked, we are not here concerned.

In seeking to uphold the judgment, the respondents do not contend that there has been any specific change by statute of the common-law rule denying to an illegitimate the right to succeed to the estate of her legitimate grandchild, but that this result necessarily follows from section 256, arguing that if the estate of the illegitimate under the conditions there stated is succeeded to in the same manner as that of a legitimate child, he has thereby been given "heritable blood" for all purposes and, like a person born in lawful wedlock, can receive the estate of a grandchild and transmit it to his ancestors.

We are unable to agree with the arguments made by respondents in this behalf. Under section 256 an illegitimate child has been given capacity to pass his own estate to maternal and paternal ancestors, according to circumstances, and, under 255 to receive, under the indicated conditions, the estate of his ancestors; and having at all times under the common law the capacity to pass his own estate to the heirs of his body, is now capable of transmitting to these such ancestral estate; but he has by no statute been given capacity to inherit the estate of his legitimate offspring or of their descendants. If he cannot take it he cannot transmit it. No more in law than in physics is it possible to transmit something that has not been or cannot be received. The effect of sections 255 and 256 is to remove part of an illegitimate's incapacity. To remove part leaves the remainder unaffected.

[16] In advancing their argument the respondents urge that the incapacity of an illegitimate to inherit was the effect of his having no heritable blood. We find this statement repeatedly made. This is a confusion of thought. The lack of heritable blood and the incapacity to inherit are not cause and effect, but both terms describe a condition attached by law to illegitimacy; and to say that a person has no heritable blood is but a figurative way of saying that he is incapable of inheriting. They are both the effect of the same cause, namely, illegitimacy. And it must also be apparent that that figurative expression refers to no inherent quality of the blood, since two children of the same parents, one born out of wedlock and not legitimated by the subsequent marriage of his parents and being received into the family of his father, and the other born in wedlock, have of course physically precisely the same blood, but the for-

mer had at common law no capacity to inherit and the latter had full capacity, or, to express it figuratively, the former had no heritable blood and the latter had.

The respondents point out that section 256 does not contain the clause, "but he does not represent his father or mother by inheriting any part of the estate of the parent's kindred, either lineal or collateral," etc., which forms part of section 255, and argue therefrom that by section 256 it was intended that he should have capacity to succeed to the estate of his descendants.

As we have already indicated, the right to inherit by representation applies only to the estate of an ancestor or ancestor's kindred, and necessarily so since only with reference to such an estate does a child represent his parent.

These views are in accord with the decisions in *Hardesty v. Mitchell*, 302 Ill. 369, 134 N.E. 745, 24 A.L.R. 565; *Sanford v. Marsh*, 180 Mass. 210, 62 N.E. 268, and *Curtis v. Hewins*, 11 Metc., Mass., 294, rendered under statutes similar to those here considered.

[17] We are not unmindful of the fact that the rule, that statutes in derogation of the common law should be strictly construed, does not prevail in this state, but that such statutes are to be liberally interpreted in order to effectuate their intent; but even the most liberal interpretation would not enable us to reach the conclusion urged by the respondents, and we are confident that the intent of the statutes considered is as herein declared.

[18,19] As a further reason for construing the statutes in question with the greatest liberality the respondents argue that they were enacted with a view to removing what they term the barbarity of the common law in its treatment of illegitimates. We cannot agree with this view. The stigma attached to illegitimacy was not so much incapacity to inherit the estate of relatives as the humiliating attitude adopted towards persons born out of wedlock. What of those restrictions remain are in the interest of morality, as they all were designed to be, the propriety of protecting which is just as great today as ever.

It follows from what we have said that the contention of appellants that the respondents are not lawful next of kin of the deceased—the evidence being uncontradicted that Anna Maria Weyeneth was illegiti-

mate—must be sustained and the judgment reversed.

[20,21] This leaves for consideration the point that the court erred in making no finding of fact on the question of kinship of the appellants to the deceased, that being one of the material issues presented. The finding in that behalf, it will be remembered, was that the relationship of each of them to the deceased, "if any," is that of second cousin once removed, a relationship in the eighth degree. This, of course, is not a finding that any relationship in fact existed, nor is it a finding that no relationship existed. The issue having been presented and being material, the court should have made a finding upon it.

[22] For the foregoing reasons the judgment is reversed and the cause remanded to the superior court for the purpose of making a finding upon the question of appellants' relationship to the deceased, and to enter judgment according to the finding so to be made. It is further ordered that the costs of appeal be paid out of the assets of the estate. Probate Code, § 1232.



24 Cal.App.2d 656

McNEW v. MULCAHY.

Civ. 1878.

District Court of Appeal, Fourth District,
California.

Feb. 1, 1938.

Rehearing Denied March 2, 1938.

Hearing Denied by Supreme Court
March 31, 1938.**I. Pleading** ☞345(2)

In action for rent, where complaint alleged the oil lease, demand and failure to pay rent, and answer admitted lease, denied demand and failure to pay rent, but did not allege payment, and further alleged a provision of the lease, and it was apparent from entire answer that only defense relied on was that lessee was not obliged to pay rent because of the provision, lessee's denial of demand and failure to pay rent was not sufficient to prevent judgment on pleadings for lessor.

2. Pleading ☞345(1)

In action for rent, where complaint alleged an oil lease, demand and failure to pay rent, and answer pleaded a clause of

lease which provided for termination of lease, upon lessee's violation of any terms of lease, under certain circumstances, and further provided that after such violation lessee could terminate lease as to the land affected by the violation, by payment of stipulated liquidated damages, the pleading of such provision, together with allegation that 90-day notice had never been given, raised no issue of fact or defense so as to defeat a motion for judgment on the pleadings.

3. Pleading $\S$ 409(1)

Where answer failed to set up a defense to cause of action set forth in complaint, judgment on the pleadings was properly entered, as against contention that plaintiff waived his right to a judgment on the pleadings by filing a memorandum of motion to set the cause for trial.

4. Pleading $\S$ 350(2)

A plaintiff who is entitled to a judgment on the pleadings is not required to make a motion therefor before the cause is set for trial or before any steps in that direction have been taken.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action for rent under an oil lease by E. W. McNew against W. T. Mulcahy. Judgment for plaintiff on the pleadings, and defendant appeals.

Affirmed.

Hazlett & Plummer and Robert J. Sullivan, all of Los Angeles, for appellant.

Siemon & Claffin, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment on the pleadings in an action for rent. The complaint alleges that the plaintiff was the owner of a described 40 acres of land in Kern county which he had leased to the defendant; that under a written lease between the parties the defendant had agreed to pay to the plaintiff \$50 per acre in advance as and for rental for this land for the third year of the term thereof, which year commenced September 24, 1936; that the lease provided for the rental to be paid at Bakersfield; that the plaintiff had demanded payment; and that the defendant had failed and refused to pay. The answer admits that the defendant had leased the property under a written oil lease whereby he had

agreed to pay the plaintiff \$50 per acre in advance as and for rental for said land for the third year of the term, which year began September 24, 1936, "but in connection with such admission" further alleges that said lease by its terms provides "among other things the following:" Here the answer sets forth a copy of a clause of the lease which provides that in the event of a violation of any of the terms of the lease the lessor may, at his option, give ninety days' written notice to the lessee whereupon the lease shall terminate except as to any wells then producing or being drilled, unless the lessee begins to remedy the matter in default within ninety days after such written notice, providing the lessee is not in default with respect to the existing wells or those being drilled, and further providing that at any time after such a default the lessee may upon payment of \$10 to the lessor as and for liquidated damages quitclaim to the lessor any portion of the land with respect to which he is then in default, whereupon the rights of the parties shall terminate as to the premises quitclaimed. The answer then admits that the lease required said rental to be paid at Bakersfield, but denies that demand has been made and that the defendant has failed, refused, and neglected to pay the same. The plaintiff on February 12, 1937, filed a memorandum of motion to set the cause for trial and on the same day filed a notice of motion for judgment on the pleadings on the ground that the answer filed by the defendant did not state a valid defense. When the matter came on for hearing, the motion for judgment was granted and a judgment entered, from which this appeal was taken.

It is first contended by the appellant that his answer raised an issue of fact which required a denial of the motion since he denied that he had failed or refused to make the payment of rental called for by the lease. It is also argued that he was under no obligation to pay said rental because of the clause of the lease referred to in his answer. These two points will be considered together.

[1, 2] While the answer denied that the defendant had failed and refused to pay the rental called for by the lease, it was not alleged, and it is not here claimed, that payment had in fact been made and it is fully apparent from the answer as a whole that the appellant relied upon the defense that he was under no obligation to pay the rental for the third year of the lease because of the provision of the lease set up in the an-

FRIEDLANDER v. STANLEY PRODUCTIONS, Inc., et al.

Civ. 11665.

District Court of Appeal, Second District,
Division 2, California.

Feb. 2, 1938.

Hearing Denied by Supreme Court
March 31, 1938.1. Action $\hookrightarrow$ 6

In action to declare that contract to obtain employment for motion picture director was canceled on ground of breach thereof, plaintiff's failure to show that controversy had been submitted to Commissioner of Labor pursuant to statute, as provided by contract was no defense, since plaintiff's contention was that contract was wholly inoperative. St.1923, p. 936, § 19.

2. Contracts $\hookrightarrow$ 322(3)

Evidence held to authorize finding that motion picture director properly canceled contract whereby agents were to obtain employment for director, on ground that director was willing to accept employment but agents did not use their best efforts to further director's professional interests as required by contract.

Appeal from Superior Court, Los Angeles County; Parker Wood, Judge.

Action for declaratory relief, comprising a judgment that a certain contract was canceled, by Louis Friedlander against Stanley Productions, Inc., and Stanley Bergerman, Inc., wherein the last-named defendant filed a cross-complaint. From a judgment for plaintiff, the last-named defendant appeals.

Affirmed.

Hearing denied by Supreme Court;
LANGDON, J., dissenting.

Swarts & Tannenbaum, of Los Angeles (Lloyd Taraday, of Los Angeles, of counsel), for appellant.

Golden & Kaufman, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from a judgment in favor of the plaintiff in an action for declaratory relief, the complaint alleging that a certain contract between the parties was canceled and that the plaintiff was under no contractual obligation to the defendant by virtue of said agreement.

For several years plaintiff had been employed by Universal Pictures Corporation

swer. Under these circumstances, the purport and meaning of the answer is to be taken from the specific defense attempted to be alleged therein and the denial of the allegation in the complaint that payment had not been made cannot here be considered as sufficient to prevent the entry of a judgment on the pleadings. *Scheeline v. Moshier*, 172 Cal. 565, 158 P. 222; *Morel v. Morel*, 203 Cal. 417, 264 P. 760; *White v. Jacobs*, 204 Cal. 334, 267 P. 1087. Nor was the clause of the contract which was set up in the answer sufficient to raise an issue of fact or to establish a defense to the cause of action set forth in the complaint. The answer merely set forth a copy of that clause of the lease with the further allegation that the plaintiff had never served upon the defendant the 90-day notice referred to therein. This clause of the lease merely gave to the respondent an option to terminate the lease upon certain conditions. There is nothing in the pleadings or in the record to indicate that this option was exercised and nothing in the lease compelled the respondent to proceed in that manner. The rental had accrued and if it be assumed that the appellant had a right to avoid the payment of past-due rent by quitclaiming the premises it is not alleged in the answer that he had quitclaimed them or made any payment in connection therewith. So far as the pleadings show the lease was still in full force and effect, the appellant was still in possession of the property, nothing had been done by either party to terminate the lease, the rental was due, and the appellant had agreed to pay the same at Bakersfield. The answer failed to set up a defense to the cause of action set forth in the complaint and the judgment on the pleadings was properly entered.

[3, 4] The only other point raised is that the respondent waived his right to a judgment on the pleadings by filing a memorandum of motion to set the cause for trial. No authorities from this state are cited in support of this contention. We are cited to no rule and we know of none which requires such a motion to be made before the cause is set for trial or before any steps in that direction have been taken. On the other hand, in the case of *Morel v. Morel*, supra, a judgment on the pleadings was affirmed where the motion therefor was not made until the day the cause came on for trial.

The judgment is affirmed.

I concur: MARKS, J.

as a director. During no part of said time did he have a personal representative or manager until he entered into the contract hereinafter referred to on January 29, 1936. On that date the plaintiff and defendants entered into an agreement by the terms of which the plaintiff employed the defendants to act as his personal representative and manager for a period of seven years in consideration of the sum of 10 per cent. of all money or things of value received by plaintiff. By the terms of said contract the defendants were to use their best efforts to further the professional interests of the plaintiff in motion pictures, radio, television, stage, and in general. The contract further provided that should the plaintiff fail to obtain a bona fide offer of employment from a responsible employer during a period in excess of four consecutive months, during all of which time plaintiff was ready, able, and willing to accept employment, either party had the right to terminate the contract by notice in writing. The contract contained a further provision that, "Controversies arising between us under the private employment agency act, and under the rules and regulations for the enforcement thereof, shall be referred to the Commissioner of Labor as provided in section 19 of said act."

During the term of the agreement plaintiff made numerous demands upon defendants that they expend greater efforts in his behalf in securing him other employment, and being dissatisfied with their efforts the plaintiff on June 1, 1936, discharged the defendants by letter. After the defendants had been discharged, they continued to claim rights under the agreement, and thereupon plaintiff filed his complaint for declaratory relief. The complaint alleged, among other things, that the defendants had failed to use their best efforts to further the professional interests of the plaintiff and had failed to obtain a bona fide offer of employment from a responsible employer for a period of four months. The trial court found that the defendants did not use their best efforts to further plaintiff's professional interests and that the defendants failed to obtain for plaintiff a bona fide offer of employment during a period in excess of four consecutive months, during which time plaintiff was ready, willing, and able to accept employment, and that the plaintiff canceled and rescinded the contract on June 1, 1936, and that the contract has ever since that

date not been of any force and effect, and also the court found in favor of defendants for balance of commissions due up to that date in the sum of \$150, and entered judgment accordingly.

The first and primary contention of the defendants is that the action was prematurely brought and cannot be maintained because of the failure of plaintiff to allege and prove that the controversy in this action had been submitted to the commissioner of labor as required by section 19 of the so-called Private Employment Agency Law. St.1913, p. 521, as amended by St.1923, p. 936.

The defendants rely upon the case of *Collier & Wallis, Ltd., v. Mary Astor*, Cal. Sup., 70 P.2d 171. That case is not in point for the reason that it was tried and decided upon the assumption by all parties that the contract of employment was still in force and effect, and it does not appear that the nonexistence of the contract or its termination was involved in any way.

[1] The instant action was brought upon the contention that the contract of employment had been canceled and terminated. If the contract had been terminated, then the arbitration provision was inoperative.

A case more nearly in point is that of *Hanes v. Coffee*, 212 Cal. 777, 300 P. 963, 964, wherein contention was made that the controversy should have been arbitrated under the terms of an agreement which read as follows: "Should the parties hereto not agree as to any question of fact affecting the rights of the parties hereto, such difference shall be settled by arbitration, each party to appoint an arbitrator, and they to appoint a third arbitrator, and the written findings of any two arbitrators to be binding on the parties hereto." In denying the right to arbitration, the Supreme Court said, "Conceding that this provision would be enforceable under our statutes, we do not think that it is applicable to the present controversy, in which the lessor contends that, by reason of failure of the lessee to commence operations within the specified period, the lease never became operative, or, if it did, is now terminated. The provision clearly does not contemplate that this question shall be submitted to arbitration, since, if the allegations of plaintiff's complaint are sustained, the result is that the lease, including the arbitration provision, is wholly

inoperative, and the lessee can claim no rights thereunder."

[2] The next contentions of the defendants are, first, that the court erred in finding that plaintiff was ready, willing, and able for upwards of the period of four months to accept employment, and, second, that the defendants did not use their best efforts to further the professional interests of plaintiff. In our view of the record, there is substantial evidence, along with the inferences which may reasonably be drawn therefrom, to sustain each of said findings, and we refrain from further comment thereon.

The final contention of the defendants is that the court erred in the admission of testimony over the objections of defendants. We see no reversible error in these contentions.

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.



24 Cal.App.2d 583

RAY v. KENNEDY et al.

Civ. 11657.

District Court of Appeal, Second District,
Division 2, California.

Jan. 27, 1938.

1. Appeal and error ☞930(1)

The District Court of Appeal must draw all inferences in favor of judgment appealed from.

2. Appeal and error ☞925(2)

The appellate court must assume on appeal from judgment for defendants in personal injury suit that plaintiff was pressing his theory that question whether he and driver of automobile wherein he was riding when injured were engaged in joint enterprise was one of fact for jury equally with theory that defendants failed as matter of law to establish such enterprise, though plaintiff moved for directed verdict on latter ground, where he did not withdraw his requested instruction as to what was necessary to constitute such enterprise, and will not assume his election to take latter posi-

tion for purpose of defeating judgment on verdict for defendants, where record does not indicate that he made election clear.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by Robert H. Ray against John R. Kennedy and another to recover damages resulting from an automobile collision. Judgment for defendants, and plaintiff appeals.

Affirmed.

H. E. Allport, of Los Angeles, for appellant.

Nourse, Betts & Jones, of Los Angeles, for respondents.

CRAIL, Presiding Justice.

This is an appeal from a judgment in favor of defendants in an automobile collision case, and the sole question presented by the plaintiff is this: "Is the negligence of the driver of one of two automobiles involved in a collision to be imputed to his passenger on the theory of joint enterprise in a case where the only facts tending to prove joint enterprise were as follows: Both the driver and passenger were employed in the same public garage; the former as a foreman, the latter as his helper or mechanic. The foreman, in the course of his employment, received a call to go out and start a stalled car and he told the helper or mechanic to go with him to start the car. They got in the foreman's own car with the foreman driving, and were en route to said job when the collision occurred."

[1,2] The reply of the defendants is that before the first witness was sworn and throughout the trial the plaintiff took the position and tried the case on the theory that the testimony relating to the question of joint enterprise was such as to present a question of fact to the jury, by handing to the court the following instruction, which the court gave to the jury: "Defendants have alleged that the plaintiffs Ybarra and Ray were engaged in a joint or common enterprise. To constitute a joint or common enterprise such as would bar plaintiff Ray's recovery for his damages, if any, if you find by a preponderance of the evidence that the driver with whom plaintiff Ray was riding was negligent there must be more than a common desire and common method of trans-

portation. There must be a community of interest in the objects or purposes of the undertaking and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control and management."

The same instruction was given at plaintiff's request in the case of *Collins v. Graves*, 17 Cal.App.2d 288, 296, 61 P.2d 1198. In that case the court said, 17 Cal. App.2d 288, at page 297, 61 P.2d 1198, 1202: "Having tried the case on the theory that the testimony relating to the question of joint enterprise was such as to present a question of fact to the jury, it does not lie within the mouth of the appellant to now argue that the court erred in so doing, and that as a question of law it must be held that no joint enterprise is shown. In *Noble v. Miles*, 129 Cal.App. 724, 19 P.2d 265, speaking through Mr. Presiding Justice Pullen, this court, following the rule stated in 2 California Jurisprudence, page 846, said: 'Parties must abide by the consequences of their own acts and cannot seek a reversal of a case upon appeal for errors which they have committed or invited. One who by his conduct induces the commission of some error by the trial court, or in other words, who has invited error, is estopped from insisting that the action of the court is erroneous.'"

The plaintiff contends that he did not submit the question of joint enterprise to the jury as a question of fact for the reason that at the close of the defendants' case the plaintiff moved for a directed verdict on the ground that the defendants had failed to establish a joint or common enterprise. Nevertheless, the fact remains that the above instruction was not withdrawn and was before the court. On appeal it is the duty of this court to draw all inferences in favor of the judgment, and this court must assume in the light of the record that the plaintiff was equally pressing his theory that the issue was a question of fact for the jury. There is nothing in the record to indicate that the plaintiff made clear his election as to which position he would take, and this court on appeal will not assume said election for the purpose of defeating the judgment. 2 Cal.Jur. 852, and cases cited.

Judgment affirmed.

I concur: McCOMB,

WOOD, Justice (concurring.)

I concur in the judgment. At the time of the collision of the two automobiles plaintiff was riding with Albert Ybarra, owner and driver of the car and the foreman of the garage where plaintiff worked as a mechanic. The other car involved in the collision was driven by John Sedine and owned by John R. Kennedy. Plaintiff commenced action against Kennedy and Sedine and a separate action was commenced by Ybarra against Kennedy and Sedine. In the last-mentioned action Kennedy and Sedine filed a cross-complaint. The actions were consolidated for trial, and the jury returned a verdict favorable to the defendants in Ybarra's action and in favor of Ybarra on the cross-complaint. The jury also returned a verdict in favor of defendants in the action filed by plaintiff.

Defendants filed their answer to plaintiff's complaint in which they alleged that plaintiff and Ybarra were engaged in a joint enterprise. They did not allege contributory negligence on the part of plaintiff other than through their allegations concerning a joint enterprise. As required by section 607a of the Code of Civil Procedure, as amended by St.1933, p. 1874, before the first witness was sworn plaintiff delivered to the court his proposed instructions, among which was an instruction for a directed verdict in favor of plaintiff and another instruction in which reference was made to the defense of joint enterprise filed by defendants with a statement of the facts necessary to be proved to establish a joint enterprise. When all of the testimony was in plaintiff asked the court to direct the jury to return a verdict in his favor.

The issue of joint enterprise was undoubtedly presented to the court by defendants, but the evidence falls far short of establishing a joint enterprise on the part of plaintiff and Ybarra. The two instructions offered by plaintiff upon the commencement of the trial were inconsistent and were offered as alternative instructions. Plaintiff took the position that there was no joint enterprise and he should not be charged with presenting this issue to the jury because of the fact that he asked the court to explain the necessary elements of a joint enterprise in case his motion for a directed verdict should be denied.

The judgment must nevertheless be affirmed for the reason that the record does not show that reversible error was committed by the trial court. It is the duty of appellant to prepare a record which will justify a reversal of the judgment if such a record can properly be presented. The transcript contains a brief bill of exceptions in which the evidence is presented touching upon the allegations of joint enterprise but the bill of exceptions does not purport to contain all of the evidence on the subject of the conduct of the two drivers at the time of the collision. The verdicts do not disclose the findings of the jury upon the allegations of negligence on the part of the drivers. For aught that appears from the record the jury may have found that neither driver was negligent. The only point now made by plaintiff is that the trial court erred in refusing to direct the jury to return a verdict for plaintiff and in refusing to grant plaintiff's motion for a judgment notwithstanding the verdict. On the state of the record before us we cannot reverse the judgment on account of either of these rulings.



25 Cal.App.2d 5

GRISINGHER v. SHAEFFER et al.

Civ. 11663.

District Court of Appeal, Second District,
Division 2, California.

Feb. 7, 1938.

Rehearing Denied Feb. 28, 1938.

Hearing Denied by Supreme Court
April 8, 1938.**1. Executors and administrators** Ⓒ438(4)

Where a claim on a note had been allowed, approved, and filed against estate of deceased comaker, administrator of estate could be joined with the surviving maker as a party defendant in action on note. Code Civ.Proc. § 379; Probate Code, §§ 713, 730.

2. Executors and administrators Ⓒ443(7)

In action on note against surviving maker and administrator of deceased comaker's estate, complaint alleging that claim based on note had been allowed, approved, and filed against estate merely admitted that in so far as estate was concerned validity

of obligation was established, but did not admit that plaintiff had already received all the relief which a judgment would give him, since allowance of claim did not conclusively establish its validity for amount of claim as to other persons interested in estate. Probate Code, §§ 713, 730, 927.

3. Executors and administrators Ⓒ444(2)

In action on note against surviving maker and administrator of deceased comaker's estate, allegation that administrator had been appointed, had qualified, and was acting administrator of estate sufficiently alleged administrator's representative capacity, since in an action against an executor or administrator it is not necessary to allege facts showing how defendant became invested with his representative capacity, but it is sufficient to allege that he is an executor or administrator.

4. Pleading Ⓒ193(7)

Objections to the prayer of a complaint cannot be taken by demurrer.

Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Action on a promissory note by F. W. Grisingher against Fred A. Shaeffer and others. From a judgment sustaining a demurrer to the complaint, plaintiff appeals.

Judgment reversed, with instructions.

Preisker, Goble, Twitchell & Stephan and Morris J. Stephan, all of Santa Maria, for appellant.

David F. Hart and Fred A. Shaeffer, both of Santa Maria, for respondents.

McCOMB, Justice.

This is an appeal by plaintiff from a judgment dismissing the action as against defendants Estate of Mary W. Shaeffer, deceased, and Fred A. Shaeffer, as administrator of the estate of Mary W. Shaeffer, deceased, after the trial court sustained a demurrer to the complaint.

The facts are these:

Plaintiff filed an action on a promissory note signed jointly by Fred A. Shaeffer and Mary W. Shaeffer. Prior to the filing of the action Mary W. Shaeffer died and a claim on the aforesaid promissory note was allowed, approved, and filed against her estate. In the present action Fred A. Shaeffer, Estate of Mary W. Shaeffer and Fred A. Shaeffer, as administrator of the estate

of Mary W. Shaeffer were joined as defendants. Defendants demurred to the complaint on the grounds that (1) it failed to state a cause of action, and (2) there was a misjoinder of parties defendant.

These are the questions presented for determination:

First. Is there a misjoinder of parties defendant when the administrator of an estate, against which a claim based upon a promissory note has been allowed, approved, and filed, is joined with the surviving maker of the promissory note?

Second. Was the following allegation in the complaint a sufficient allegation of the representative capacity of defendant administrator: "That Mary W. Shaeffer, during her lifetime, was a resident of the City of Santa Maria, County of Santa Barbara, State of California; that said Mary W. Shaeffer died after the 14th day of July, 1933, and that the Estate of Mary W. Shaeffer, deceased, is now in process of administration in the said County of Santa Barbara, State of California, and that Fred A. Shaeffer has been appointed, has qualified, and is acting administrator of the Estate of Mary W. Shaeffer, deceased?"

Third. Can objections to the prayer of a complaint be raised by demurrer?

[1] The first question must be answered in the negative. The law is settled that the administrator of a deceased debtor or promisor may be joined as a party defendant with the surviving obligor. *Bostwick v. McEvoy*, 62 Cal. 496, 502; *Briggs v. Breen*, 123 Cal. 657, 661, 56 P. 633, 886; 11b Cal.Jur. 325, § 911, title, Executors and Administrators (1934).

In *Bostwick v. McEvoy*, supra, Mr. Justice McKee, 62 Cal. 496, at page 502 says: "It is urged that the estate of a deceased maker of a joint promissory note executed by two or more, can not be joined as defendant with the surviving debtor or debtors in an action on the note. * * * Such an action, however, is maintainable in this state, but any judgment recovered against the administrator must be made payable *de bonis testatoris*."

Again in *Briggs v. Breen*, supra, 123 Cal. 657, at page 661, 56 P. 633, 886, our Supreme Court says: "It is claimed by respondents that the administrator of J. R. Breen is improperly joined as a defendant with James F. Breen. There were, at common law, valid formal reasons against such joinder, and they were allowed effect in two

early cases in this state. [Citing cases.] But section 379, Code Civ.Proc., provides that 'any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein.' The language is certainly broad enough to allow the joinder of the administrator of a deceased debtor or promisor with survivors who were jointly liable with him to the plaintiff; and such is the later doctrine of this court, to which we adhere. [Citing cases.] The objection of misjoinder must be overruled."

[2] The allegation that the claim had been allowed, approved, and filed is an admission that in so far as the estate is concerned the validity of the obligation has been established, and that it already ranks among the acknowledged debts of the estate to be paid in due course of administration. Section 713, Probate Code.

A judgment gives additional relief. Section 730 of the Probate Code provides as follows: "A judgment rendered against an executor or administrator upon any claim for money, against the estate of his testator or intestate, when it becomes final, conclusively establishes the validity of the claim for the amount of the judgment; and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due. * * * No execution shall issue upon the judgment, nor shall it create any lien upon the property of the estate, or give the judgment creditor any priority of payment."

It thus appears that the obtaining of a judgment conclusively establishes the validity of the claim for the amount of the judgment. Merely allowed claims have no such conclusiveness. When the administrator presents his accounting to the court of such allowed claim and other claims, it is subject to attack by any person interested in the estate.

Probate Code, § 927, reads in part as follows: "Any person interested in the estate may appear and file written exceptions to the account, and contest the same. * * * All matters, including allowed claims not passed upon on the settlement of any former account, and *not reduced to judgment*, may be contested for cause shown." (*Italics ours*.)

It is thus apparent that the complaint does not admit that plaintiff had already re-

ceived all the relief which a judgment would give him.

[3] The second question must be answered in the affirmative. The law is settled that in actions against executors or administrators it is not necessary to allege in the complaint facts showing how the defendant became invested with his representative capacity, but simply that he is such an executor or administrator. *Wise v. Williams*, 72 Cal. 544, 547, 14 P. 204.

[4] The final question must be answered in the negative. Objections to the prayer of a complaint cannot be taken by demurrer. *Rollins v. Forbes*, 10 Cal. 299, 300; *Hoffman v. Pacific Coast Const. Co.*, 37 Cal. App. 125, 130, 173 P. 776.

In *Rollins v. Forbes*, supra, Mr. Justice Field, 10 Cal. 299, at page 300 says: "Objections to the prayer of a complaint cannot be taken by demurrer. If the specific relief asked cannot be granted, such relief as the case stated in the bill authorizes, may be had under the clause in the prayer for general relief, and even in the absence of such clause where an answer is filed."

For the foregoing reasons the trial judge's ruling in sustaining the demurrer was erroneous. The judgment is reversed, with instructions to the trial court to overrule the demurrer, allowing defendants an appropriate time within which to file an answer to the complaint.

We concur: CRAIL, P. J.; WOOD, J.



24 Cal.App.2d 690

PEOPLE v. HAZELWOOD.

Cr. 3056.

District Court of Appeal, Second District,
Division 2, California.

Feb. 2, 1938.

1. Criminal law  570(1)

Defendant's appearance and testimony as witness in forgery trial, wherein issue of his insanity was also tried, were properly considered in connection with alienists' testimony on such issue.

2. Criminal law  1159(3)

The trial court's determination of fact question on conflicting evidence will not be disturbed by District Court of Appeal.

3. Criminal law  483

A question asked alienist by counsel for defendant, pleading not guilty of forgery and not guilty by reason of insanity, as to whether person in defendant's frame of mind when examined by witness would be likely to believe statements made to him without too much analyzation as to truth or falsity thereof, was improper as calling for witness' conclusion on subject not in issue.

4. Criminal law  624

Defendant, failing to object to determination of issues raised by pleas of not guilty and not guilty by reason of insanity in one trial or to request separate trials on such issues, waived right to separate trials thereon, and may not predicate error in appellate court on failure to try them separately.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Roy L. Hazelwood was convicted of forgery, and he appeals.

Affirmed.

Richard A. Haley, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

McCOMB, Justice.

Defendant was convicted after trial by the court without a jury on four counts of forgery. He was also found to be sane at the time of the commission of the forgeries.

Viewing the evidence most favorable to the respondent, the material facts are:

On several different occasions in the months of July and August, 1937, defendant forged and cashed checks at various banks in the county of Los Angeles. To the information charging him with the aforesaid crimes defendant entered pleas of (a) not guilty and (b) not guilty by reason of insanity.

Defendant relies for reversal of the judgment on the following propositions:

First. The evidence is insufficient to sustain the trial court's finding that defendant

was sane at the time of the commission of the offenses charged in the information.

Second. The trial judge committed prejudicial error in sustaining an objection to the following question asked an alienist called on behalf of defendant: "Q. Now, would a person in the frame of mind in which you found this defendant on the date of your first examination be likely to believe statements made to him by others, without too much analyzation as to the truth or falsity of those statements?"

Third. It was prejudicial error for the trial court to determine in one trial the issues raised by plaintiff's pleas of (a) not guilty and (b) not guilty by reason of insanity.

Defendant's first proposition is untenable. We have examined the record and are of the opinion there was substantial evidence considered in connection with such inferences as the trial court may have reasonably drawn therefrom to sustain its finding of fact that defendant was sane at the time he committed the forgeries alleged in the information.

[1, 2] It is to be noted that defendant took the witness stand and was examined. The trial judge therefore had before him defendant and his evidence, factors which were properly considered in connection with the testimony given by the alienists bearing upon the issue of defendant's sanity at the time of the commission of the crimes charged against him. The trial court's determination of a question of fact upon conflicting evidence will not be disturbed by us. *Thatch v. Livingston*, 13 Cal.App.2d 202, 56 P.2d 549; *People v. Groves*, 9 Cal.App.2d 317, 321, 49 P.2d 888, 50 P.2d 813; *Leavens v. Pinkham & McKevitt*, 164 Cal. 242, 245, 128 P. 399.

[3] Defendant's second proposition is likewise untenable. The question propounded to the witness called for his conclusion upon a subject not in issue; hence, the trial judge's ruling in sustaining an objection to it was correct.

[4] Defendant's final proposition is also without merit. It is the law that by failing to object to the determination in one trial of the issues raised by the pleas of not guilty and not guilty by reason of insanity, defendant waives his right to separate trials on such pleas and may not in this court predicate error on the failure of the trial court to have separate trials of the issues raised by the respective pleas. *People v.*

Pettinger, 94 Cal.App. 297, 300, 271 P. 132. In the present case defendant neither requested separate trials on the issues raised by his two pleas nor did he object to such issues being determined in one trial.

For the foregoing reasons, the judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



24 Cal.App.2d 670

PEOPLE v. COMBS.

Cr. 3023.

District Court of Appeal, Second District,
Division 1, California.

Feb. 2, 1938.

Hearing Denied by Supreme Court
March 2, 1938.

1. Criminal law ⇐254

In rape prosecution, credibility of testimony of prosecutrix was for the trial court.

2. Rape ⇐51(1)

Evidence held to sustain conviction of rape, as against contention testimony of prosecutrix was inherently improbable.

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Chester B. Combs was convicted of rape, and admitted a prior conviction of assault with intent to commit rape, and from the judgment of conviction, and from the order denying a motion for a new trial, the defendant appeals.

Judgment and order affirmed.

Anna Zacsek, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., for the People.

DORAN, Justice.

By information, appellant was accused and found guilty of the crime of rape, a felony, after a trial by the court sitting without a jury. The information also alleged a prior conviction, to wit, assault with intent to commit rape, a felony, which was admitted by the defendant. The appeal is from the judgment, as well as from the order denying the motion for a new trial.

The record reveals that the defendant was a used car buyer and a former employee of a finance company. The prosecutrix was an eighteen year old girl.

Appellant relies chiefly upon the asserted "inherent improbability of the girl's story." In that connection, appellant argues that, "An examination of the record in this case and in particular the testimony of the prosecutrix, we believe, will convince this court that a shocking miscarriage of justice has occurred. That the trial court should have accepted the incredible story told by the prosecutrix and rejected the testimony given by appellant and other persons can only be accounted for by the unreasonable and illogical view taken in the premises."

It would serve no useful purpose to go into the details of the alleged offense, except to note that when the prosecutrix reached her home, immediately after the incident, she was screaming and crying, and was hysterical; her clothing was mussed up and torn, her stockings were torn and ripped; and one knee was bruised and bleeding.

It should also be noted that the defendant admitted that he read about the occurrence in the newspapers the next morning, and that he called the prosecutrix's home and talked to her mother on the telephone. Defendant told the mother that he would be willing to come out and explain the matter, but she replied that, "the only thing I expect you to do is twenty years in the penitentiary." That afternoon defendant saw by the newspapers that the district attorney had issued a complaint and that there was a warrant out for his arrest; he thereupon left this state and went to Vancouver. Defendant returned to Los Angeles about a month later and remained four days; he then went to Tulsa, Oklahoma, and from there went to Dallas, Tex., where he was apprehended, and from which city he was returned to the state of California.

[1,2] Appellant's contention, hereinbefore mentioned, lacks support in the record. The testimony of the prosecutrix, in other words, is not of that kind and character which appellate courts declare, as a matter of law, to be the equivalent of no evidence at all; in the circumstances, the trial judge's measure of its value is final. There is no resemblance between the evidence in the case at bar and the evidence purporting to support the respective judgments in the cases relied upon by appellant. To the contrary, as a matter of

law, the evidence is abundantly sufficient to support the judgment of the trial judge, whose duty it was to determine, in the first instance, the credibility of the witnesses. The argument that testimony is inherently improbable is not uncommon and was probably advanced before the trial judge as it is advanced herein on appeal. In that connection the trial judge might well have concluded that, as contended by respondent, "Far from being inherently improbable, * * * the story told by the prosecutrix bears all the earmarks of truth and is readily understandable."

There being no errors in the record, the judgment and order appealed from are affirmed.

I concur: YORK, P. J.

WHITE, J., being disqualified, does not participate in this decision.



24 Cal.App.2d 700

TOMS v. MERCANTILE ARCADE REALTY CORPORATION.

Civ. 11639.

District Court of Appeal, Second District,
Division 2, California.

Feb. 4, 1938.

1. Appeal and error ⇨996

Where different conclusions may reasonably be drawn by different minds from the evidence, the trial court's finding of fact will not be disturbed on appeal.

2. Landlord and tenant ⇨169(8)

Evidence that plaintiff, who had entered office building to see an occupant thereof pursuant to his employer's directions, and who stepped on piece of lumber on stairway and fell to bottom of stairway, attempted to descend stairway, although it was very dark and he could not see where he was stepping, sustained finding that plaintiff was guilty of contributory negligence, precluding recovery for injuries against owner of building.

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by L. M. Toms against the Mercantile Arcade Realty Corporation for personal injuries received when the plaintiff fell down a stairway. From an adverse judgment, the plaintiff appeals.

Affirmed.

Noel B. Martin and Richard L. Oliver, both of Los Angeles, for appellant.

George L. Greer, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before the court without a jury in an action to recover damages for personal injuries plaintiff appeals.

The undisputed facts are:

April 6, 1935, shortly before 9 o'clock in the morning, plaintiff started to descend a stairway, which led from the first floor of the Spring Arcade building to the basement. The stairway consisted of four steps leading downward to a landing and eight steps at right angles to the left of the landing, ending on the basement level. Plaintiff had entered the Spring Arcade building pursuant to directions from his employer that he see Mr. Rosing, who had offices in the basement of the Spring Arcade building, which building was owned by defendant Mercantile Arcade Realty Corporation, of which defendant C. J. Pearce was trustee.

At the time plaintiff started to descend, the four steps and the landing were illuminated by light from electroliers in the ceiling of the hallway. From the landing to the basement the stairway was dark, plaintiff being able to discern clearly only the first step and faintly the second step. He stepped onto the first step, and, on taking a second step, placed his foot upon a piece of lumber, which caused him to fall to the bottom of the stairway, as a result of which he suffered serious personal injuries. Plaintiff on several occasions, the last of which was about six months prior to the date of the accident, had used this stairway.

This is the sole question presented for our determination:

Was there substantial evidence to sustain the trial court's finding that plaintiff was contributorily negligent?

[1] This question must be answered in the affirmative. The law is settled in this jurisdiction that, where different con-

clusions may reasonably be drawn by different minds from the evidence, the trial court's finding of fact will not be disturbed on appeal. *Meindersee v. Meyers*, 188 Cal. 498, 502, 205 P. 1078.

[2] The conclusion either that plaintiff's conduct in proceeding down the darkened stairway was or was not consonant with the acts of a reasonably prudent person may reasonably be drawn from the facts in the present case. Applying the rule of law above stated, the trial court's finding that plaintiff did not act as a reasonably prudent person in proceeding down the darkened stairway, and was therefore contributorily negligent, finds substantial support in the evidence and will not be disturbed by this court.

The judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.



24 Cal.App.2d 644

In re BOUTZ' GUARDIANSHIP.

BOUTZ v. ALBERT.

Civ. 5915.

District Court of Appeal, Third District,
California.

Feb. 1, 1938.

Hearing Denied by Supreme Court
March 31, 1938.

1. Insane persons ☞36

An order of the superior court, which is a court of general jurisdiction, appointing a guardian for an incompetent's estate, is not open to collateral attack and will be presumed to have been correctly made.

2. Insane persons ☞36

Where no want of jurisdiction appears on face of record, an order appointing a guardian for an incompetent's estate is not subject to collateral attack and, in absence of a direct attack, the order will be presumed to be valid.

3. Insane persons ☞36

The appointment of a nonresident guardian for incompetent's estate could not, upon death of incompetent, be collaterally attacked by executor of incompetent's estate, by objecting to final account of the non-resident guardian.

4. Insane persons ⇨34

Statutes relating to appointment of guardian for incompetent's estate do not prohibit appointment of nonresident guardian, and vest large discretion in the court, the paramount consideration being the welfare of the incompetent. Probate Code, §§ 1461, 1580.

5. Insane persons ⇨34

A nonresident brother of an incompetent could be appointed as guardian of the incompetent's estate. Probate Code, §§ 1461, 1580.

6. Insane persons ⇨34

A court has power to appoint a nonresident guardian for an incompetent's estate in absence of statutory bar, and, except that he may be subject to removal by reason of nonresidence, such guardian, as long as he remains a guardian, has all the rights and powers of any guardian. Probate Code, §§ 1461, 1580.

7. Insane persons ⇨45

The bond given by a nonresident guardian for an incompetent's estate is enforceable, regardless of the place of guardian's residence, and furnishes protection to the estate and assurance that ward will not be prejudiced by reason of the possible immunity of the guardian from process from California.

8. Insane persons ⇨34

As regards validity of appointment of nonresident guardian for incompetent's estate, a guardian is not a "civil officer" within provisions of statute requiring such officer to be resident of California. Probate Code, § 841.

[Ed. Note.—For other definitions of "Civil Officer," see Words & Phrases.]

9. Insane persons ⇨34

As regards validity of appointment of nonresident guardian for incompetent's estate, provisions of Probate Code referring to appointment of executors and administrators could not be read into provisions referring to guardianship of insane persons, by virtue of statute providing that, when not otherwise specifically prescribed, practice and procedure of division of Code relating to insane persons should be governed by practice and procedure applicable to administration of estate of deceased person. Probate Code, § 1606.

10. Insane persons ⇨40

The guardian appointed in California for estate of a resident incompetent could collect rents from property of incompetent owned in another state, and pay the taxes due on such property.

11. Insane persons ⇨40

The guardian appointed in California for the estate of a resident incompetent could deal with personalty owned by incompetent in another state, since personalty would be under jurisdiction of state of incompetent's residence.

Appeal from Superior Court, Del Norte County; Warren V. Tryon, Judge.

Proceeding in the matter of the guardianship and estate of Minnie Boutz, an incompetent person, wherein W. J. Albert was appointed guardian of the estate. Upon the death of Minnie Boutz, Francis E. Boutz was appointed administrator of her estate, and to the final account of the guardian, Francis E. Boutz, as administrator and as an heir at law, filed objections. From an adverse order, the objector appeals.

Affirmed.

T. F. Peterson, of Eureka, for appellant.

Pugh & Pugh, of Red Bluff, M. O. Wilkins, of Medford, Or., and Wilcox & Rodin, of Turlock, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Appellant here contends that the superior court erred in appointing a nonresident as guardian of the person and estate of a resident insane person.

In 1913 Minnie Boutz, then the wife of M. M. Boutz, was adjudged insane and committed to a state hospital. In 1916 M. M. Boutz was appointed guardian of the person and estate of his wife. In 1928 Minnie Boutz was paroled from the hospital to the care of her brother, residing in Oregon. In 1932 Boutz resigned as guardian, and his account was settled and approved. In his resignation as guardian he set forth that Minnie Boutz was under the personal care and observation of her brother in Oregon, and that it would be for the best interests of the incompetent that the brother be appointed guardian of her person and estate. Thereupon, upon a petition duly filed, W. J. Albert, the brother, was appointed such guardian of her person and estate.

Thereafter accounts were annually filed by the guardian and duly settled and approved until 1936, when, Minnie Boutz having died, he filed his final account. Francis E. Boutz, a son of deceased, residing in California, was appointed administrator of her estate, and to this final account of the guardian, both as administrator and as an heir at law, filed objections. The gist of the objections was that, W. J. Albert being a nonresident of California, the court was without jurisdiction to appoint him as guardian. It is also claimed that, even assuming the appointment to be valid, respondent never qualified because of his nonresidence, and, never having qualified, his acts were void.

It is further claimed that in any event the superior court of California was without jurisdiction to settle respondent's accounts except in so far as they related to the property of the ward in California, and could make no valid order affecting any property beyond the boundaries of the state.

We are not called upon to determine whether the court could have appointed a nonresident as guardian of the person, as that question has become immaterial by reason of the death of the ward.

[1-3] The superior court being a court of general jurisdiction, an order appointing a guardian of an incompetent person is not open to collateral attack, and will be presumed to have been correctly made. *Isaacs v. Jones*, 121 Cal. 257, 53 P. 793, 1101. *Hodgdon v. Southern P. R. Co.*, 75 Cal. 642, 17 P. 928, applies the general rule directly to the appointment of a guardian by a probate court. In *re Estate of Sharon*, 179 Cal. 447, 177 P. 283, dealing with adoption, where the proceedings are purely statutory and unknown to the common law, holds the record must show all the jurisdictional requirements. However proceedings in guardianship were known to the common law, and, if no want of jurisdiction appears on the face of the record, an order appointing a guardian is not subject to collateral attack, and, in the absence of a direct attack, it will be presumed that the order is valid.

In *Johnson v. Furchtbar*, 96 Okl. 114, 220 P. 612, 613, certain persons sought to recover possession of land upon the ground that the sale by the guardian of the minor to whom the land belonged was ineffectual because the probate court was without jurisdiction, it being alleged that the ward

was a nonresident of the county wherein the appointment was made, and that the hearing was had without notice and without a determination of the question of residence of the ward.

The court said: "It has been repeatedly held that where a judgment is entered by a court of general jurisdiction, and the record is silent as to the existence of facts which gave the court jurisdiction, it will be presumed that all facts necessary for the proper rendition of the judgment have been found to exist before judgment was rendered, and the same cannot be attacked in a collateral proceeding."

Let us, nevertheless, consider the principal contention that the court was precluded by statute from appointing a nonresident guardian.

[4, 5] Section 1461 of the Probate Code provides that any relative or friend may file a verified petition alleging that a person is insane. Nowhere does the Code attempt to enumerate or designate whom the court shall appoint as guardian, but vests a large discretion in the court, the paramount consideration being the welfare of the ward. An examination of section 1580 of the Probate Code discloses that, after appointment, the removal of a guardian is discretionary with the court upon a guardian becoming a nonresident of the state.

On volume 14, *Ruling Case Law*, p. 571, the principle is stated: "A nonresident may be appointed guardian of the estate of an incompetent if a statute makes no reference to residential qualifications." In *re Sall*, 59 Wash. 539, 110 P. 32, 35, 626, 140 Am.St. Rep. 885, cited by *Ruling Case Law* in support of this proposition, is quite analogous to the situation here before us. It appears that *Sall*, a resident of Minnesota, applied to the courts of Washington for, and was appointed guardian of the estate of his brother. An appeal was taken from the order of appointment upon the ground, among others, that the nonresidence of the applicant disqualified him to act as guardian, and that the Washington court was without jurisdiction to appoint as guardian a resident of one domiciled in the state of Minnesota.

"It is next insisted that the court, in any event, had no power to appoint a nonresident as a guardian. It will be remembered that the statute * * * provides for a guardian for the estate only. No reference is made to residential qualifications. The

general rule as we understand it to be is that, in the absence of a statute, the court may appoint any fit and proper person, if he be a resident or nonresident. His bond answers for his presence, and, in theory at least, he is always before the court. While a court should not, and probably would not, have the power to appoint a nonresident guardian of the person of a resident incompetent, the manifest objections to such a procedure can have no application, where it is the thing and not the person which is the subject of the court's intervention."

In 28 Corpus Juris 1081, it is said: "While in the absence of statutory provisions to the contrary, a nonresident may be appointed guardian, such appointments are not favored, the rule being that a resident should be appointed rather than a nonresident, unless some very strong reason for appointing the latter is made to appear."

[6] So, in the absence of a specific statutory bar, the courts of this state have the power to appoint a nonresident guardian, and except perhaps that he may be subject to removal by reason of nonresidence, such guardian, as long as he remain such, has all the rights and powers of any guardian.

[7] The bond given by a guardian before the issuance of letters is enforceable, regardless of the place of his residence, and furnishes protection to the estate and assurance that a ward will not be prejudiced by reason of the possible immunity of the guardian from the process from this state.

Appellant makes no point that the incompetent person had moved from the state prior to her death. That question is not presented here, and we are assuming the fact to be that the legal residence of the ward was in Del Norte county. She was a resident of the county of Del Norte at the time the guardianship was instituted and the guardian appointed, although she was paroled to her brother in Oregon, and for several years before her death lived in Oregon, but there is nothing in the record before us showing any change of residence. Neither do we pass upon the question of the nonresidence of the guardian of the person, for, as before remarked, that issue was terminated by the death of the ward.

[8] Appellant suggests that a guardian is a public officer, and therefore the provisions of section 841 of the Political Code requiring such officer to be a resident of

California, but a guardian is not classified as a civil officer.

[9] By virtue of section 1606 of the Probate Code appellant also attempts to read into the provisions of the Probate Code, referring to the guardianship of insane persons, the provisions of the Code relative to the appointment of executors and administrators, but such section cannot be applied here, as that section applies to matters of procedure only.

[10,11] It is also claimed that the guardian appointed in California cannot deal with the property owned by the ward in Oregon and Kansas. As to the Kansas property, all that was done was to collect the rents and pay the taxes. The property in Oregon seems to have been personal property, and, if the ward was a resident of California, and we find nothing to the contrary in the record, then her personal property would be under the jurisdiction of California.

We find no error in the order from which this appeal is taken, and the same is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.



24 Cal.App.2d 692

STEINER v. DAVIS.

Civ. 2101.

District Court of Appeal, Fourth District,
California.

Feb. 3, 1938.

1. Evidence ⇨461(1)

An ambiguity as to what was intended by words "Renewed Apr. 1926," appearing on a note opens the way for proof of intention of parties, not for purpose of contradicting the writing, but for purpose of discovering what was intended thereby. Civ. Code, §§ 1636, 1644, 1654.

2. Limitation of actions ⇨179(3)

A complaint filed in 1930 on a note executed in 1919 and payable three years after date, which set forth note bearing words "Renewed Apr. 21, 1926," and which was signed by maker with notation that note

was renewed for valuable consideration for same period and on same terms as original note and a showing that on death of payee in 1929 maker was bequeathed sum to be applied on note, stated a cause of action as against demurrer alleging that action was barred by limitations.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action to recover on a note by Luna Kies Steiner, as executrix of the estate of Sarah A. Kies, deceased, against Byron Dade Davis, also known as B. D. Davis. A demurrer to the complaint was sustained, and, plaintiff refusing to amend, judgment was given for defendant, and plaintiff appeals.

Reversed, with instructions to overrule demurrer.

C. Arden Gingery and E. W. Miller, both of Los Angeles, for appellant.

Hert & Withington, of San Bernardino, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment after a demurrer to an amended complaint had been sustained and the plaintiff had refused to amend. The only question involved is whether it appears from the face of the complaint that the cause of action attempted to be set up was barred by the statute of limitations.

The action is one to recover a balance upon a promissory note for \$3,000 dated May 6, 1919, payable three years after date to Mrs. B. W. Kies and signed "Byron Dade Davis." A copy of the note is set forth in the complaint, and at the bottom thereof appears the following: "Renewed Apr. 21, 1926 B. D. Davis." It is also alleged that on or about April 21, 1926, the defendant for a valuable consideration and in writing renewed said note for a period of three years from and after that date on the same terms and conditions as those contained in the original note, and that the note and obligation as thus renewed became due and payable on April 21, 1929. It is further alleged that Sarah A. Kies was also known as Mrs. B. W. Kies; that she died on June 17, 1929; that the plaintiff qualified as the executrix of her will on September 16, 1929; that by the terms of her will the defendant was bequeathed \$2,000 to be applied upon the principal of said note; that the remaining \$1,000

is owing and unpaid; and that interest on the note was paid by the defendant up to May 6, 1929. The original complaint was filed on September 10, 1930, and the plaintiff has appealed from a judgment in favor of the defendant.

The appellant contends that the effect of the words "Renewed Apr. 21, 1926," placed upon the bottom of the note by the respondent, was to renew the note for the same period of time and on the same terms as provided in the original note; that is, to renew it for a period of three years from and after that date and make the same payable on April 21, 1929, in which event the statute of limitations would not run until April 21, 1933. The respondent contends, on the other hand, that this was neither a renewal nor an extension, and that, at best, this notation on the note had the effect of an acknowledgment of the debt at that time, with the result that the statute had fully run on April 21, 1930, some months before this suit was filed.

There appear to be no cases in this state which bear directly upon the question before us. In *Brenneke v. Smallman*, 2 Cal.App. 306, 83 P. 302, 304, where the word "renewed" was used by the holder of a note, the court remarked: "The word 'renewed' may properly be used to express an agreement on the part of the maker of a note, but is quite out of place as expressing an agreement on the part of the payee extending the time of payment." We are here concerned with such an agreement on the part of the maker of a note and with the question as to what the parties intended thereby. Ordinarily the payee of a note retains possession thereof and this notation must have been placed on the note with the consent of Mrs. Kies. The circumstances indicate that she was a party to this agreement, whatever it was. The note continued in her possession, apparently, as suit was brought thereon by her executrix after her death, she received the interest up to May 6, 1929, and she must have considered the obligation of the note still in force, as she provided in her will that the respondent should receive a credit thereon in the amount of \$2,000.

[1,2] A contract is to be so interpreted as to give effect to the intention of the parties, Civ.Code, § 1636, its words are to be taken in their ordinary and popular sense, Civ.Code, § 1644, and in cases of uncertainty the language used should be interpreted most strongly against the party who caused the uncertainty to exist, Civ.Code, § 1654. The

STEINER v. DAVIS.

Civ. 2102.

District Court of Appeal, Fourth District,
California.

Feb. 3, 1938.

Limitation of actions § 179(3)

A complaint filed in 1930 on three notes executed respectively in 1916, 1919, and 1920, and payable one year after date, each containing notation "Renewed Apr. 21, 1926," and signed by maker, did not as a matter of law show that statute of limitations had run.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action to recover upon three notes by Luna K. Steiner against Byron D. Davis, also known as B. D. Davis. A demurrer to the complaint was sustained, and judgment entered for defendant, and plaintiff appeals.

Reversed, with directions to overrule demurrer.

C. Arden Gingery and E. W. Miller, both of Los Angeles, for appellant.

Hert & Withington, of San Bernardino, for respondent.

BARNARD, Presiding Justice.

word "renewed" in connection with such a thing as a note or a contract, in the absence of words showing a different intent, seems to carry with it the idea of recreating the same or of again entering into an agreement containing the same terms. While the renewal of a note is more commonly accomplished by the giving of a new note, no good reason appears why a note should not be renewed for the same period and upon the same terms by a notation made thereon if such is the intention of the parties. Something was intended by the notation thus made on this note, and it seems clear that this was not merely an "extension" of the time of payment, as that term is used in a legal sense. If the language used may be taken as expressing merely a recognition of the obligation as of that date with the effect of again starting the running of the statute, that meaning does not clearly and conclusively appear. It is equally consistent with the words used to take them as expressing an intention to renew the note itself; in other words, to remake the note as of that date including the provision for payment in three years. If suit had been brought upon this note within three years after the notation was made, and before any default in the payment of interest, the respondent might well have claimed that the note was not due and that the action was premature, and it is extremely probable that he would have done so. The least that can be said is that an ambiguity appears, which opens the way for proof of the intention of the parties at the time, not for the purpose of contradicting the writing but for the purpose of discovering what was intended thereby. *Searles v. Gonzalez*, 191 Cal. 426, 216 P. 1003, 28 A.L.R. 78. Under the circumstances here appearing, it cannot be said, as a matter of law, that the statute of limitations had run and the demurrer should have been overruled.

The views herein expressed find support in certain decisions from other jurisdictions. *Edwards v. Goode*, 5 Cir., 228 F. 664; *Kedey v. Petty*, 153 Ind. 179, 54 N.E. 798; *Grace & Co. v. Strickland*, 188 N.C. 369, 124 S.E. 856, 35 A.L.R. 1296; *Farmers' & Traders' Bank v. Laird*, 188 Mo.App. 322, 175 S.W. 116; *Lime Rock Bank v. Mallett*, 34 Me. 547, 56 Am.Dec. 673.

The judgment is reversed, with instructions to overrule the demurrer.

I concur: MARKS, J.

I concur: MARKS, J.

25 Cal.App.2d 10

GWIN v. CAMP et al.

Civ. 2152.

District Court of Appeal, Fourth District,
California.

Feb. 7, 1938.

As Modified Feb. 15, 1938.

Rehearing Denied March 2, 1938.

Hearing Denied by Supreme Court
April 8, 1938.**1. Husband and wife ⇨249**

Land belonging to husband and wife as joint tenants is not community property, as community and joint tenancy estates cannot exist in same property at same time.

2. Husband and wife ⇨14(10)

Land belonging to spouses as joint tenants retained such status until termination of such estate by wife's deed conveying her interest to another after interlocutory divorce decree, which did not set aside property to her.

3. Husband and wife ⇨14(10)

A wife's conveyance of her interest in property, held by spouses as joint tenants, to third party, terminates such tenancy, whereupon husband and wife's grantee become tenants in common, each of whom owns undivided half interest in property.

4. Tenancy in common ⇨3

The title to lot, conveyed by wife to her attorney and by husband to one who conveyed it to mortgagee after granting of interlocutory divorce decree to wife and execution of commissioner's deed to mortgagee as purchaser at sale on foreclosure of mortgage, which omitted such lot from property therein described by mutual mistake, as did divorce decree awarding wife all of community property, vested in her grantee and mortgagee as tenants in common.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Ira A. Gwin against Kenneth Lavelle Camp, Harold L. Camp, and others, to quiet title to a lot, in which defendant Harold L. Camp filed a cross-complaint to quiet title thereto and reform a mortgage and proceedings foreclosing it. Judgment for plaintiff, and cross-complainant appeals.

Reversed and remanded.

Burke, Hickson, Burke & Marshall and Harry C. Williams, all of Los Angeles, for appellant.

Ira A. Gwin, of Los Angeles, in pro. per.

MARKS, Justice.

Plaintiff instituted this action to quiet his title to lot 1, block 11, as shown by map No. 1 of the Bear Valley and Allesandro Development Company, in Riverside county, Cal. Defendants Blanch Camp and Eli Ralph Camp disclaimed. Harold L. Camp asserted title in himself and filed a cross-complaint in which he sought to have his title quieted and also to have a mortgage and the proceedings foreclosing it reformed because of mutual mistake. Judgment went for plaintiff, and Harold L. Camp has appealed.

For brevity, we will hereafter refer to the lots in block 11 in the Bear Valley tract by the lot number only. We will refer to Harold L. Camp as the defendant.

By a deed dated March 6, 1930, Sadie A. Miller deeded to Kenneth Lavelle Camp and Cora Alice Camp, his wife, as joint tenants, lots 1, 7, and 8 in the Bear Valley tract. On March 12, 1930, Kenneth Lavelle Camp and Cora Alice Camp conveyed these lots to the Security-First National Bank of Los Angeles, trustee, for Sadie A. Miller, beneficiary, to secure the payment of a \$3,000 promissory note. The trustee executed a full reconveyance of this property on March 9, 1931.

Under date of March 10, 1931, Kenneth Lavelle Camp and Cora Alice Camp executed a mortgage to defendant to secure the payment of a \$3,000 promissory note. The mortgaged property was described as lots 7 and 8 of the Bear Valley tract. This mortgage was foreclosed and under date of March 20, 1935, defendant received a commissioner's deed to the property.

Defendant, in his cross-complaint, sought to have the mortgage and foreclosure proceedings reformed so as to include lot 1 of the Bear Valley tract which he maintained had been omitted from the description in the mortgage by mutual mistake.

On September 12, 1933, Cora Alice Camp instituted an action for divorce against Kenneth Lavelle Camp. In an amended and supplemental complaint she alleged: "That the community property consists of the following: Thirty acres of walnut bearing land at Ironwood and Redland Road in Moreno, Riverside County, California, together with about fifty shares of water stock in the Moreno Mutual Irrigation Company; that said property is of the reasonable value of \$6,000.00; that the said property is mortgaged to Harold L. Camp, a brother of the defendant, in the sum—\$3,000.00."

An interlocutory decree of divorce was granted on July 9, 1934, which contained the following:

"That all the community property is awarded plaintiff and cross-defendant, consisting of thirty acres of walnut orchards at Moreno, California, referred to plaintiff's amended and supplemental complaint and described as follows:

"Lot seven (7) and eight (8) in Block Eleven (11) as shown by Map number One of the Bear Valley and Allesandro Development Company, recorded in Book 11, page 10 of Maps, Records of San Bernardino County, California, and all of which is in Riverside County, California."

On April 22, 1935, Cora Alice Camp moved to have the interlocutory decree amended so that lot 1 of the Bear Valley tract be included in the property set aside to her. Her motion was denied.

On January 21, 1935, Cora Alice Camp deeded to Ira A. Gwin lot 1 in the Bear Valley tract. Gwin, the plaintiff here, was attorney for Cora Alice Camp in the divorce and subsequent proceedings, and had notice of the condition of the title to lot 1.

On May 6, 1935, Kenneth Lavelle Camp conveyed this same lot one to Blanch Camp. On May 9, 1935, Blanch Camp conveyed this property to Harold L. Camp, defendant here.

This action to quiet plaintiff's title was instituted on May 22, 1935.

The evidence is overwhelming in support of the contention of defendant that a mutual mistake was made in drawing the mortgage which resulted in the omission of lot 1 from the property therein described. When the commissioner's certificate of sale was issued in the foreclosure proceedings defendant went into possession of the thirty acres, farmed all of them, and paid taxes on all of it. The mistake was not discovered until early in 1935, shortly before the deeds to plaintiff and to defendant were executed.

From the facts outlined, it is apparent that the findings to the effect that plaintiff is the owner of all of lot 1 of the Bear Valley tract is not supported by the evidence, but is contrary to it. He could have acquired no greater interest in the property than Cora Alice Camp, his grantor, had at the time she conveyed to him.

76 P.2d—11

[1, 2] The land was originally the property of Kenneth Lavelle Camp and Cora Alice Camp as joint tenants. It was not community property as the two estates, community and joint tenancy, cannot exist in the same property at the same time. *Siberell v. Siberell*, 214 Cal. 767, 7 P.2d 1003. It was not set aside to Cora Alice Camp in the divorce decree. It retained its status of joint tenancy property until that estate was terminated by the deed from Cora Alice Camp to plaintiff.

[3, 4] Where a husband and wife hold property in joint tenancy and the wife conveys her interest to a third party, the joint tenancy is terminated and the husband and the grantee of the wife become tenants in common, each owning an undivided one-half interest in the property. *Delanoy v. Delanoy*, 216 Cal. 23, 13 P.2d 513; *Smith v. Lombard*, 201 Cal. 518, 258 P. 55; *Tilden v. Tilden*, 81 Cal.App. 535, 254 P. 310; *Oberwise v. Poulos*, 124 Cal.App. 247, 12 P. 2d 156. The interest of Cora Alice Camp passed to plaintiff. The interest of Kenneth Lavelle Camp passed to defendant. This would leave the title to lot 1 of the Bear Valley tract vested in plaintiff and defendant as tenants in common, each owning an undivided one-half interest in the property at the time of the commencement of this action. It would remain so vested unless defendant be successful in an effort to divest plaintiff of his title.

The findings of fact are so confused and contrary to admitted facts that we are unable to reach a satisfactory conclusion as to the trial court's grounds for its decision. To illustrate: It was found that Kenneth Lavelle Camp and Cora Alice Camp did not deliver their promissory note for \$3,000 to defendant; that they did not execute and deliver to defendant a mortgage on lots 7 and 8 of the Bear Valley tract; that Kenneth Lavelle Camp and Cora Alice Camp did not make default in the payments on the note; that the mortgage was not foreclosed. Facts directly contrary to these findings were proved by undisputed documentary evidence. There are other findings equally contrary to undisputed evidence.

For these reasons we believe the judgment should be reversed and the cause remanded for a new trial.

The judgment is reversed.

I concur: BARNARD, P. J.

24 Cal.App.2d 687

BRADFORD v. MAULLIN.

MAULLIN et al. v. BRADFORD.

Civ. 11674.

District Court of Appeal, Second District,
Division 2, California.

Feb. 2, 1938.

Appeal and error ¶786

Where left rear of plaintiff's automobile was struck at intersection by left front of defendant's automobile, which entered intersection from plaintiff's left, contention, on appeal from judgment allowing recovery for plaintiff's injuries, that the fact that plaintiff's automobile traveled 40 feet after collision established that testimony of eyewitnesses that plaintiff stopped before entering boulevard was untrue, and that plaintiff was contributorily negligent, was so unsubstantial as to require dismissal of appeal, under court rule. Rules for the Supreme Court and District Courts of Appeal, rule V, § 3.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action for injuries received in an automobile collision by Lea B. Bradford against Leonard Maullin, and action by Leonard Maullin and another against Lea B. Bradford. From adverse decisions, defendant in the first action and plaintiffs in the second action appeal. On motion to dismiss defendant's appeal in the first action.

Appeal dismissed.

Raymond G. Stanbury and Charles H. Goebel, both of Los Angeles, for appellants.

Joseph A. Spray, of Los Angeles, for respondent.

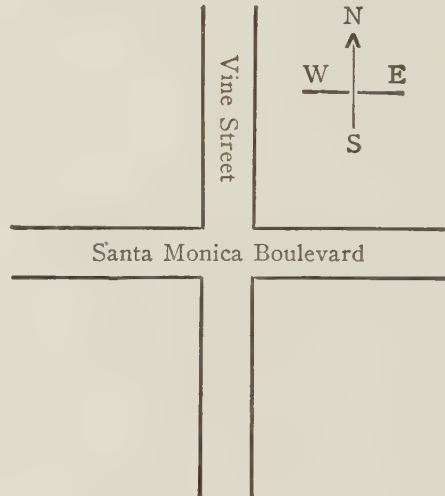
McCOMB, Justice.

This is a motion to dismiss the appeal from a judgment in favor of respondent for the sum of \$1,500 after trial by the court without a jury. The motion is made in accordance with the provisions of section 3, rule V, Rules for the Supreme Court and District Courts of Appeal of the State of California, which reads in part as follows: "At any time after the filing of the opening brief of an appellant in a civil action, the respondent may, upon due notice, move for a dismissal of the appeal or an affirmance of the judgment

or order on the ground that the appeal was taken for delay only or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. * * *" 213 Cal. xliii.

Viewing the evidence most favorable to plaintiff, the material facts are these:

Diagram of the intersection where the accident hereinafter described occurred.



September 20, 1936, respondent was driving her coupé in a southerly direction on Vine street just north of where it intersects Santa Monica boulevard in the city of Los Angeles. She brought her car to a stop before entering the intersection. Thereafter, while she was proceeding through the intersection at a speed of about ten miles per hour, the left rear of her car was struck by the left front of an automobile being driven by appellant in a westerly direction on Santa Monica boulevard. Respondent's automobile was overturned and came to rest approximately forty feet from the point of impact of the two cars. As a result of the accident plaintiff suffered personal injuries.

Appellant relies for reversal of the judgment on the proposition that *since respondent's automobile traveled approximately forty feet after the collision, the testimony that respondent made a boulevard stop before entering Santa Monica boulevard was untrue, and therefore she was guilty of contributory negligence.*

This proposition is untenable. An examination of the record discloses that two witnesses testified respondent brought her automobile to a stop before proceeding to

cross Santa Monica boulevard. This testimony and the court's implied finding of fact that defendant had made a boulevard stop at the intersection are entirely consistent with the undisputed testimony that the automobile in which respondent was riding traveled a distance of forty feet from the point of collision before coming to rest. The trial court from the evidence may have very properly believed that the failure of respondent's automobile to stop within forty feet from the point of collision was due to the impetus it received when struck by the car operated by appellant.

Our examination of the record discloses that the questions raised on this appeal are so unsubstantial as not to require further argument. Therefore, pursuant to the provisions of section 3, rule V, Rules for the Supreme Court and District Courts of Appeal, *supra*, *Combes v. Bond*, 1 Cal. App.2d 743, 37 P.2d 195, the motion to dismiss the appeal is granted.

The appeal is dismissed.

We concur: CRAIL, P. J.; WOOD, J.



24 Cal.App.2d 665

**PHILIPPINE REFINING CORPORATION
OF NEW YORK v. CONTRA COSTA
COUNTY (two cases).**

SAME v. CITY OF RICHMOND.

Civ. 10726.

District Court of Appeal, First District,
Division 2, California.

Feb. 2, 1938.

Commerce 31

Imported cocoanut oil owned by the importer and temporarily held in storage tanks, not for indiscriminate sale, but solely to facilitate transshipment in the original form, but in smaller lots pursuant to antecedent contracts with purchasers, was not subject to local taxation, in view of the commerce clause of the Federal Constitution, and the clause forbidding state duties on imports. Const.U.S. art. 1, § 8, cl. 3; art. 1, § 10.

Appeal from Superior Court, Contra Costa County; A. F. Bray, Judge.

Three actions by the Philippine Refining Corporation of New York against Contra Costa County in two actions and against the City of Richmond in the other action, to recover taxes paid under protest, were consolidated pursuant to stipulation. Judgment for defendants, and plaintiff appeals.

Reversed, with directions.

Wm. M. Maxfield, of San Francisco, for appellant.

Francis P. Healey, Dist. Atty., of Richmond, for respondent Contra Costa County.

T. M. Carlson, of Richmond, for respondent City of Richmond.

SPENCE, Justice.

Three separate actions were brought to recover taxes paid under protest. Said actions were consolidated pursuant to stipulation. The trial court sustained demurrers to the complaints without leave to amend and, from the judgment thereafter entered in favor of defendants, plaintiff appeals.

This appeal involves the question of whether certain cocoanut oil, which was temporarily stored in tanks at Point San Pablo, was subject to local taxation under the circumstances alleged in said complaints. The three complaints were substantially similar in all of their essential allegations, and therefore we need only discuss the allegations found in the complaint in action numbered 19345.

It is alleged therein that plaintiff conducts an importing business from its offices in New York City consisting of the importing of cocoanut oil from the Philippine Islands and the selling of the same to various customers within the United States in performance of contracts previously entered into with said customers; that the cocoanut oil so imported is in most instances sold to manufacturers who do not have large storage facilities and who therefore contract for said oil to be delivered in lots of one or more tank cars over a period of months; that cocoanut oil cannot be economically imported in such small quantities and can only be economically imported in steamer tank lots of from 500 to 1,000 tons each; that, by reason thereof, it is necessary for plaintiff to have storage and transshipment facilities

at the point of transfer from ship to rail in order to permit it to complete shipments of said oil at the times required in the purchasers' contracts; that for said purposes plaintiff owns and operates a receiving plant at Point San Pablo.

It is further alleged therein that plaintiff conducts said importing business by aggregating orders sufficient to fill one or more tanks available in steamers and when sufficient orders have been aggregated, plaintiff makes importations of oil and said oil is discharged from the steamers at its said plant at Point San Pablo; that on the first Monday in March, 1933, by reason of the manner of conducting said import business, plaintiff had on hand at its plant a quantity of oil imported on four steamers. The facts concerning the amount, the time of arrival, and time of departure from said plant of the oil in question were set forth in detail. It was further alleged that none of said oil was held by plaintiff for indiscriminate sale, but that it was imported for sale under said several contracts and thereafter delivered to the purchasers pursuant thereto, approximately 90 per cent. of the oil continuing its journey to purchasers outside the state of California and the remaining 10 per cent. continuing its journey to purchasers within the state of California; that at all times in question title to said oil remained in plaintiff and that said oil remained in the original form in which it had been imported into the United States; that said oil was on the taxing date in question an import into the United States from a point beyond the territorial limits thereof and was in the course of an interstate and foreign movement and in transit and was not legally assessable or taxable by virtue of the provisions of the Constitution and laws of the United States.

The position of appellant is based upon two provisions of the Constitution of the United States. Article 1, section 10 thereof, provides: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws." Article 1, section 8 thereof, provides: "The Congress shall have Power * * * 3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

These provisions and the authorities construing the same are relied upon by appel-

lant to support its contention that the coconut oil was not subject to local taxation under the circumstances set forth in the complaints. In our opinion, appellant's contention must be sustained. *Carson Petroleum Co. v. Vial*, 279 U.S. 95, 49 S.Ct. 292, 293, 73 L.Ed. 626; *City of Galveston v. Mexican Petroleum Corp.*, D.C., 15 F.2d 208; see, also, *Southern Pacific Co. v. Callexico*, D.C., 288 F. 634; *In re Taxes Pacific Guano & Fertilizer Company*, 32 Haw. 431.

Numerous authorities are discussed by counsel in their briefs, but we believe that the foregoing authorities are controlling here. In this connection it may be stated that, while the constitutional provisions above mentioned are separate and distinct, they are closely related and are discussed together in their application to the facts in many of the cases. The decisions are rested upon one or the other or both of said provisions.

The case of *Carson Petroleum Co. v. Vial*, supra, is closely in point although the oil there was being exported. The company took orders from foreign buyers and then purchased oil in Kansas, Oklahoma, and Texas and caused it to be transported in railroad tank cars to St. Rose, La. The company stored the oil there in tanks while awaiting shipment by steamer to the foreign buyers. The oil in each tank car was not segregated or assigned to any particular cargo or shipment, but was pumped into the large storage tanks and held until a ship arrived or until a sufficient quantity was accumulated to make up a cargo. There, as here, the oil was not held in storage for indiscriminate sale; title to the oil remained in the oil company and it was shipped from the point of storage in the same form in which it had been received. The oil company there contended that this constituted "a continuous interstate and foreign shipment," not subject to local taxation and this contention was sustained. The court stated the rule, as expressed in numerous authorities, that "The crucial question to be settled in determining whether personal property or merchandise moving in interstate commerce is subject to local taxation is that of its continuity of transit." It then discussed several earlier authorities dealing with the question of what constitutes continuity of transit and concluded that: "There has been a liberal construction of what is continuity of the journey, in cases where the court finds from the circum-

stances that export trade has been actually intended and carried through."

The facts in *City of Galveston v. Mexican Petroleum Corporation*, supra, are strikingly similar to those before us. The company there imported oil from Mexico and held it in storage tanks at Galveston while awaiting distribution under contracts previously made. It was there decided that the oil so held was not subject to taxation by the city of Galveston. The decision was rested upon the import clause rather than the commerce clause of the Constitution. The court cited the leading case of *Brown v. Maryland*, 12 Wheat. 419, 25 U.S. 419, 6 L.Ed. 678, the opinion in which was written by Chief Justice Marshall and has been frequently quoted in the subsequent cases. In the last-mentioned opinion it is said, 12 Wheat. 419, at page 441, 6 L.Ed. 678: "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the constitution."

Respondents cite and rely mainly upon the case of *General Oil Co. v. Crain*, 209 U.S. 211, 28 S.Ct. 475, 52 L.Ed. 754. That case is clearly distinguishable. It appears there that the oil was brought from the north to a distribution plant in Memphis. It was there placed in storage tanks and indiscriminately sold and distributed from that point. After a time, in an attempt to escape a local tax, part of the oil was put in tank No. 1, marked "Oil already sold in Arkansas, Louisiana and Mississippi," while the oil which had not been sold was kept in the other tanks. This case is thoroughly discussed in *Carson Petroleum Co. v. Vial*, supra, both of said cases having been decided under the commerce clause. The court there points out that: "The case has caused discussion, and it must be admitted that it is a close one and might easily have been decided the other way. The result was probably affected by the impression created by the original situation and the somewhat artificial rearrangement of tanks in a large entre-

pot for redistribution of oil to avoid previous taxability." In view of the distinction pointed out by the court in the *Carson Case*, it appears unnecessary to discuss further the *General Oil Case*.

Respondents also rely upon *Mexican Petroleum Corporation v. South Portland*, 121 Me. 128, 115 A. 900, 26 A.L.R. 965. That case is not only distinguishable upon its facts, but it was decided without reference to the commerce clause. Furthermore, the holding of that case, based upon the court's construction of the import clause, was expressly repudiated in *City of Galveston v. Mexican Petroleum Corp.*, supra.

In the present case, it appears from the allegations of the complaint that shipment from the Philippine Islands through the plant at Point San Pablo to various purchasers was intended and carried through pursuant to contracts made prior to the time that the journey began; that it was neither practical nor according to business custom to make through shipments in segregated lots to each individual customer at the times and in the amounts called for by the contracts of the purchasers; that the storage tanks in appellant's plant at Point San Pablo were used solely for holding said oil in its original form during a halt in the journey to the purchasers; and that none of the oil so held was intended or used for indiscriminate sale. In other words, it appears from said allegations that the oil was held at Point San Pablo solely for a purpose incidental to the transportation, to wit, the transfer from ship to rail and the forwarding in tank car lots in accordance with the requirements of the contracts previously made. Such allegations show a continuity of transit which was not present in the cases cited by respondents.

Under the authorities above cited, we are of the opinion that the allegations of the complaints were sufficient to show that the oil was not subject to local taxation while so held and that the demurrers to the complaint should have been overruled.

The judgment is reversed, with directions to the trial court to overrule the demurrers.

We concur: NOURSE, P. J.; STURTEVANT, J.

24 Cal.App.2d 746

ALPHONZO E. BELL CORPORATION (a Corporation), Plaintiff and Appellant, v. **BELL VIEW OIL SYNDICATE et al.**, Defendants and Respondents.
Civ. 5926.

District Court of Appeal, Third District,
California.

Jan. 27, 1938.

Hearing Denied by Supreme Court
March 28, 1938.

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Overton, Lyman & Plumb, Chalmers L. McGaughey, and Donald H. Ford, all of Los Angeles, for appellant.

Neil S. McCarthy, Earl L. Banta, and Haight, Trippett & Syvertson, all of Los Angeles, for respondents.

PER CURIAM.

For the reasons stated in the opinion this day filed in Cal.App., 76 P.2d 167, the orders of the trial court sustaining demurrers to the plaintiff's amended complaint must be held erroneous, the judgment of dismissal therein reversed, and the cause remanded, with directions to the trial court to overrule the demurrers, granting leave to the plaintiff to file an amended complaint, if so desired, and likewise, granting privilege to the defendants to file answers within such reasonable time as may be deemed just.



24 Cal.App.2d 747

ALPHONZO E. BELL CORPORATION (a Corporation), and Union Oil Company of California (a Corporation), Plaintiff, v. **BELL VIEW OIL SYNDICATE**, Hooper C. Dunbar, Cralg C. Horton and Gordon B. Morris, Defendants and Respondents; Union Oil Company of California (a Corporation), Plaintiff and Appellant.

Civ. 5928.

District Court of Appeal, Third District,
California.

Jan. 27, 1938.

Hearing Denied by Supreme Court
March 28, 1938.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Andrews, Blanche & Kline, Paul M. Gregg, and Eugene H. Blanche, all of Los Angeles, for appellant.

Haight, Trippett & Syvertson, of Los Angeles, for respondents.

PER CURIAM.

For the reasons stated in the opinion filed this day in Cal.App., 76 P.2d 167, the orders of the trial court sustaining the respondents' demurrers to the pleadings of the plaintiffs must be held erroneous, and the judgment of dismissal following thereon is hereby reversed, and the cause referred to the trial court, with directions to overrule the demurrers referred to, and also to grant the motion of plaintiffs to file amended pleadings, if so advised, giving leave to the defendants to file an answer to the plaintiffs' pleadings within such time as the court may deem just.



24 Cal.App.2d 748

ALPHONZO E. BELL CORPORATION (a Corporation), Plaintiff and Appellant, v. **BELL VIEW OIL SYNDICATE et al.**, Defendants and Respondents.

Civ. 5929.

District Court of Appeal, Third District,
California.

Jan. 27, 1938.

Hearing Denied by Supreme Court
March 28, 1938.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Overton, Lyman & Plumb, Eugene Overton, Chalmers L. McGaughey, and Donald H. Ford, all of Los Angeles, for appellant.

Haight, Trippett & Syvertson, of Los Angeles, and Cullinan, Hickey & Sweigert, of San Francisco, for respondents.

PER CURIAM.

For the reasons stated in the opinion filed this day in Cal.App., 76 P.2d 167, the order of the trial court sustaining the respondents' demurrer to the plaintiff's complaint, without leave to amend, must be held erroneous, and the judgment of dismissal in said action reversed, and the cause is hereby remitted to the trial court with

directions to overrule the defendants' demurrer, granting leave to the plaintiff to file an amended complaint, if so advised, and also granting leave to the respondents to file an answer to plaintiff's complaint within such reasonable time as the court may deem just.



24 Cal.App.2d 587

**ALPHONZO E. BELL CORPORATION v.
BELL VIEW OIL SYNDICATE et al.
(ALEXANDER et al., Interveners).**

Civ. 5927.

District Court of Appeal, Third District,
California.

Jan. 27, 1938.

Hearing Denied by Supreme Court
March 28, 1938.

1. Evidence ⚡20(1)

Courts may take judicial notice of the condition and development of the petroleum industry.

2. Evidence ⚡5(1), 9

A court may take judicial notice of matters of science and common knowledge.

3. Evidence ⚡20(1)

A court may take judicial notice of the physical and economic laws governing oil and gas production.

4. Evidence ⚡20(1)

A court may not take judicial knowledge of whether any particular oil or gas well is drilled vertically, or whether it departs from the vertical, or in what direction it will depart.

5. Mines and minerals ⚡52

In action for value of oil obtained through subsurface trespass and to enjoin further trespass, plaintiff's complaint and intervening complaints were not demurrable for failure to allege whether defendants' wells were drilled in accordance with prevailing art and drilling practice, since the fact that other drillers had committed trespass would not excuse defendants' trespass.

6. Mines and minerals ⚡86

The state, under its police power, may regulate the production of oil and gas.

7. Mines and minerals ⚡51(1)

Where surface owners committed subsurface trespass on adjoining property by drilling wells at an angle, adjoining owners and lessee could recover value of hydrocarbons taken, whether trespassers' wells drew more hydrocarbons from so-called "common supply," and whether adjoining wells drew less, than would have been the case had trespassers' wells been drilled vertically.

8. Mines and minerals ⚡47

There is no "common ownership" of oil in a particular field in subsurface owners, other than the "correlative right" to take oil passing underneath each subsurface owner's location, and the "common reservoir," or "common source," or "common supply," means the sand strata through which oil, gas, and other hydrocarbons may be passing, and is in no sense a stationary reservoir, of which each surface owner, as a tenant in common, owns a particular portion.

9. Mines and minerals ⚡51(5)

Where surface owners committed subsurface trespass on adjoining property by drilling wells at an angle, measure of damages to adjoining owners and lessee was value of hydrocarbons taken, and not value of difference between hydrocarbons taken by adjoining owners and lessee and hydrocarbons which they would have taken had trespassers' wells been drilled vertically.

10. Appeal and error ⚡917(1)

On appeal from judgment sustaining demurrer to complaint, allegations of complaint would be taken as true.

11. Mines and minerals ⚡52

All those injured by conversion of hydrocarbons through subsurface trespass of adjoining owners in drilling oil wells at an angle had a right and cause of action for injunction and damages, whether they were lessors or lessees, royalty owners, or owners as lessees, and any one of those injured could join, either as plaintiffs or defendants, all others having ownership or interest in property allegedly converted.

12. Parties ⚡40(2)

In action against oil well drillers by adjoining owners for value of hydrocarbons obtained through subsurface trespass and to enjoin further trespass, owners of other adjoining lands and lessee of both adjoining owners were "interested parties" entitled to

intervene, under statute, either as plaintiffs or defendants. Code Civ.Proc. § 387.

[Ed. Note.—For other definitions of "Interest," see Words & Phrases.]

13. Mines and minerals ⚡47

Petroleum gas and oil belong to owner of land and are a part thereof so long as they are on it or in it, or subject to his control, but, when they escape and go into other land, or come under another's control, former owner's title is gone.

14. Mines and minerals ⚡47

Where adjoining owner drills his own land and taps a deposit of oil or gas extending under his neighbor's field, so that it comes into his well, it becomes his property.

15. Mines and minerals ⚡47

A surface owner may bore wells to extract natural gas and oil, and has the exclusive right on his own land to seek to acquire them, but they do not become his property until the effort has resulted in dominion and control by actual possession.

16. Mines and minerals ⚡47

A surface owner has the exclusive right to reduce to possession all oil and gas, migratory or otherwise, that may be found in the soil beneath his premises, or that may seep into his wells where wells are bottomed beneath surface location.

17. Mines and minerals ⚡81

Under mineral leases making lessee's right to drill wells subject to delivery of royalty oil, to which lessors had title, both lessors and lessee had right of action for value of hydrocarbons converted through subsurface trespass by adjoining owners, who drilled wells at an angle, and to enjoin further trespass.

18. Appeal and error ⚡837(4)

On appeal from judgment sustaining demurrer to plaintiff's complaint and intervening complaints, affidavit setting up certain facts which allegedly showed that causes of action were barred by limitation could not be considered, but court was confined to the pleadings in determining whether judgment was proper.

19. Limitation of actions ⚡95(1)

Where mineral owners converted hydrocarbons from adjoining land by subsurface trespass in drilling wells at an angle, falsely denied making directional survey, concealed

logs, and made misleading reports to state division of oil and gas, and adjoining lessors and lessee were prevented for a considerable time from discovering conversion, three-year limitation on action for value of hydrocarbons and to enjoin further trespass did not begin to run until discovery of conversion. Code Civ.Proc. § 338, as amended by St.1935, p. 1673.

20. Limitation of actions ⚡95(1)

Where mineral owners converted hydrocarbons from adjoining land by subsurface trespass in drilling wells at an angle, their surface operations did not give adjoining lessors and lessee sufficient notice of possible or probable subsurface trespass to start running of three-year limitation on action for value of hydrocarbons and to enjoin further trespass. Code Civ.Proc. § 338, as amended by St.1935, p. 1673.

21. Evidence ⚡60

A presumption exists that no one intends to violate the law.

22. Evidence ⚡60

A presumption exists that no one intends to convert the property of another.

23. Evidence ⚡20(1)

A court could not take judicial notice that surface operations in drilling oil well indicated that drillers intended to convert to their own use subsurface properties belonging to others.

24. Limitation of actions ⚡95(1)

The three-year limitation on action for subsurface trespass and conversion of minerals by secret underground operations does not begin to run until discovery of conversion. Code Civ.Proc. § 338, as amended by St.1935, p. 1673.

25. Parties ⚡42

In action for value of hydrocarbons converted through subsurface trespass and to enjoin further trespass, where petition for leave to intervene was filed within 180-day limitation, intervenor's right of action was not barred by limitation, notwithstanding that its petition was not granted until after expiration of 180-day period. Code Civ.Proc. § 349½, as added by St.1935, p. 2285.

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action by the Alphonzo E. Bell Corporation against the Bell View Oil Syndicate

and others for the value of oil extracted from plaintiff's property by subsurface trespass, and for an injunction to restrain the further extraction of oil, wherein Emma J. Alexander and others and the Union Oil Company of California filed complaints in intervention. From an adverse judgment, Emma J. Alexander and others and the Union Oil Company of California appeal.

Reversed and remanded, with directions.

G. P. Adams, of Los Angeles, Philip S. Dickinson, of Whittier, and Hill, Morgan & Bledsoe, Kenneth K. Wright, Andrews & Andrews, and Paul M. Gregg, all of Los Angeles, for appellants.

Overton, Lyman & Plumb and Haight, Trippett & Syvertson, all of Los Angeles, for respondents.

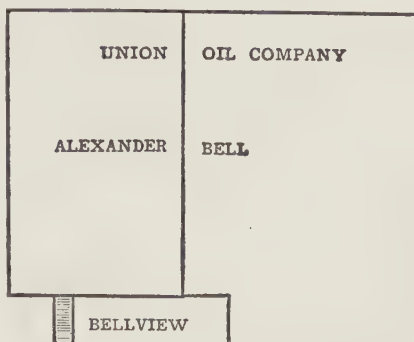
Mr. Justice PLUMMER delivered the opinion of the court.

The foregoing causes, 76 P.2d 166, were argued at one time, but were presented upon four different transcripts and four separate sets of briefs. The main facts, however, and the questions involved are essentially the same. After considering the briefs filed in the separate causes and the transcripts furnished the court, we have reached the conclusion that substantially all the meritorious questions involved may be presented and considered in one opinion. For this purpose we have followed the discussion of the various questions presented for consideration as set forth in the transcript and briefs found in civil No. 5927.

Incidentally, when the rights of the Alphonzo E. Bell Corporation, a corporation, as owner of one of the tracts of land involved, and the rights of Emma J. Alexander et al., as owners of one of the tracts involved, and the rights of the Union Oil Company as lessee of the Alphonzo E. Bell Corporation, a corporation, the owner of one of the tracts, and likewise the ownership or right to maintain the action by Emma J. Alexander et al., as owners of one of the tracts involved, lessors of the Union Oil Company, are considered, the burden placed upon the court is considerably lessened by treating of the respective rights of owners and lessees in one opinion, rather than writing separate opinions involving the rights of lessors and lessees.

The premises involved are situate in what is known as the Santa Fé Springs Oil Fields in the county of Los Angeles. The situation

of the respective tracts is shown by the diagram presented herewith:



The Alexander and Alphonzo E. Bell Corporation properties lie to the northward of the Bell View property. The Bell View property is indicated by a red pencil.¹ The Bell View property is a small tract 60 feet in width by 240 feet in length. The properties lie above what is called the Buckbee Zone, a strata of sand containing oil, gas, and other hydrocarbons. The Buckbee Zone is somewhat cone-shaped, with the higher portion thereof under a line drawn easterly and westerly through the center of the Alexander and Alphonzo Bell properties. While spoken of as an oil pool, the Buckbee Zone has really no relation to what is understood ordinarily by the word "pool," but is a strata of sand underlying the properties mentioned, bearing the minerals above stated.

The appeals in the above-named cases are all based upon the decision of the trial court sustaining a demurrer to the plaintiff's last amended complaint to the complaints in intervention filed by Emma J. Alexander et al., and the complaint in intervention filed by the Union Oil Company. (For convenience we eliminated part of the names attached to the respective litigants.)

The gravamen of the respective actions circle around the alleged action of the owners and lessees of the Bell View properties in boring wells so as to intercept the Buckbee Zone oil strata or zone underneath the properties belonging to Emma J. Alexander et al., and Alphonzo E. Bell Corporation, both of which properties were and are under lease to the Union Oil Company. We have thus presented for consideration: First. As to whether an action will lie for the recovery of oil, or its value, produced from property belonging to the plaintiff, Alphon-

¹ Ed. Note.—Indicated by shaded portion on plat.

zo E. Bell Corporation, also, belonging to Emma J. Alexander et al., and the Union Oil Company, as lessees thereof, where the defendants' wells have left the property belonging to the defendants' lessors and under lease to the Bell View Corporation. Second. May adjoining owners, claiming that the wells entered into and the oil was produced from their properties, intervene? Third. Is such trespass a continuing one and subject to an injunction? Fourth. The question of when the statute of limitations is tolled, owing to the fact that the trespass and the extraction of the oil alleged is a subsurface trespass and a concealed extraction and conversion of the oil obtained through wells which have departed from the vertical or from the premises under lease to the defendants and the oil obtained coming from the Alexander and the Alphonzo Bell properties. Fifth. Is the statute of limitations tolled, by a complaint, in favor of one interested as intervener but joined as defendant, for failure to join as plaintiff, but asking leave to join as intervener prior to the expiration of the statutory period? Sixth. Is a statute constitutional which places a shorter limitation for action for oil taken by subterranean trespass than by surface trespass, and as to subterranean trespass makes the period absolute as to wells drilled prior to a certain date, and dependent upon knowledge of the agreed parties as to wells drilled subsequent thereto?

The record shows the filing of a number of amended pleadings and the asking of leave to file additional amended pleadings subsequent to the orders of the trial court sustaining demurrers without leave to amend. We omit listing the proceedings leading up to the sustaining of the demurrers, which we have just mentioned, for the reason that it would unnecessarily extend the length of this opinion.

The original complaint filed by the Alphonzo E. Bell Corporation and the pleadings filed by the interveners set forth the ownership of the respective parties and the leases executed in favor of the Union Oil Company. These pleadings all allege that two certain wells known as Bell View Grohs Well No. 2 and Bell View Grohs Well No. 3, are bottomed in the Bell property; that both wells have perforated areas lying within the subsurface of the Alexander property, and that oil has been, and is being, extracted by the defendants from both properties. The pleadings contained allegations that the drilling by the defend-

ants was secretly done, and under such circumstances that the plaintiff and interveners remained in ignorance of the fact that the wells were within the property just mentioned, and that the oil was being extracted therefrom, and that the discovery was made within such a date of the beginning of the actions that the statute of limitations was tolled. The value of the oil extracted by the defendants is set forth and judgment for its value is asked, and also the pleadings contained a prayer for the issuance of an injunction to restrain the further extraction of oil through the wells just mentioned.

The reasons the acts of the defendants were not discovered immediately upon the sinking of the two wells, and were not discovered until within three years preceding the beginning of the actions, are set forth, and likewise the concealment by the defendants of where the oil was being obtained, and also the misrepresentation of the defendants concerning their activities, when inquiry was made, are likewise alleged.

The size of the properties known as the Alexander Tract and the Alphonzo E. Bell Corporation Tract is set forth showing that one tract contains about 40 acres and one tract contains something over 10 acres.

The deflection from the vertical of the two wells mentioned herein is likewise alleged, showing a deviation from the vertical of several hundred feet. The failure of the defendants to file a statement with the state division of oil and gas, as required, showing the depth of the wells referred to, is likewise alleged. The misrepresentation by the defendants as to the surveys of the two wells is also mentioned, and the failure of the defendants to show the deepening of the wells subsequent to their original boring or construction. As shown by the map, the Alexander and Alphonzo Bell Tracts are north and northeasterly of the Bell View Tract. The complaint alleges that the two wells involved were drilled by the defendants in such a manner as to depart from the vertical and extend to and perforate the Buckbee Zone underneath the Alexander and Alphonzo Bell Tracts, and that, in doing so, the two wells depart from the vertical by several hundred feet; that the defendants had concealed that a directional survey had been made of the two wells so that the plaintiff and interveners did not discover the same, nor had any reason to discover

the same, or to become acquainted with any facts which would have enabled them to acquire knowledge as to the wells so far departing from the vertical as to extend into the Buckbee Zone underlying the Alexander and Alphonzo Bell properties, until sometime during the year 1935, when the plaintiff and interveners were informed that a directional survey had been made showing the facts as alleged in the complaint.

Based upon what we have heretofore stated, the right of the owners of the Alexander property and of the Union Oil Company as the lessee of the property owned by the Alphonzo Bell Corporation, a corporation, to intervene, appears to us so clearly and convincingly established that we need only cite section 387 of the Code of Civil Procedure. The language of that section is so plain and unambiguous that the citation of authorities and cases bearing upon the question of intervention appears to be needless. Thus, without further comment, we hold that the right of intervention existed in the parties mentioned as to the causes of action touched upon in any of the four cases now before us upon appeal. But the owners of the Alexander property and the Union Oil Company, under the section cited, were entitled to appear as interveners and join either the plaintiff or the defendants as they should elect.

The cases cited upon the various appeals are so numerous as to preclude the advisability of citing or analyzing more than simply those which may be considered as determinative of the issues presented for our consideration. Many of the cases relate to questions which are only incidental or collateral to the main issues, and, though examined, need not be mentioned herein.

The first question presented which requires attention is whether the complaint or the complaints in intervention state a cause of action. The respondents have presented to us a theory upon which the cases should be decided, and which apparently was followed by the trial court in entering its orders from which appeals have been taken herein.

The theory of the respondents, and the theory upon which the trial court decided the demurrers as shown by excerpts from the opinion set forth in the briefs, is that an owner of property overlying a strata of sand impregnated with oil, gas, and other hydrocarbons has a common right with

every owner of surface overlying such strata of sand, to sink a well and take therefrom oil, gas, and other hydrocarbons, irrespective of whether that well is contained within the exterior boundaries of the surface of the owner or departs therefrom to any extent so long as it extracts oil from the strata underlying any of the properties. The language of the respondents' brief is not just exactly in the words which we have used, but that is the force of the argument, even though couched in perhaps less plain and simple words.

The contention, otherwise stated, is that such a sand strata is common property from which any property owner is entitled to extract all the oil possible to collect, and which may come into the wells drilled by such surface owner, irrespective of where those wells are bottomed. Numerous cases are cited where the word "common" is used, and also where the words "correlative rights" are used, but, so far as the cases are concerned which have been presented to us for our consideration, and in so far as we have been able to discover the same, not a single case supports the doctrine that an owner of a surface has a right to sink his wells in such manner as to depart from perpendicular lines drawn from the exterior of the surface owned by the one sinking the well and departing therefrom in such a manner as to extract oil which may be found underneath the surface of an adjoining owner.

In every case to which our attention has been called and which we have discovered for ourselves, the common right or the exclusive right is spoken of as to every surface owner to sink a well on his own property and extract from the subsurface beneath his surface tract of land, oil, gas, and hydrocarbons. Not a single case supports the doctrine that wells may be so sunk by a surface owner as to depart from underneath his own lands and intercept oil, gas, or other hydrocarbons from beneath the surface of a neighboring owner. The common right and correlative right refer only to the fact that a surface owner is entitled to capture all of the oil, gas, and hydrocarbons that may, by hydrostatic or other pressure, be caused to impregnate the oil strata beneath his own property and reduce the same to possession by bringing them to the surface through wells drilled upon, and bottomed underneath his own surface location. The correlative right and the common right mentioned in the

different cases is just the case which we have mentioned, and is not carried a single inch further. The fact that the doctrine of oil or gas in place cannot be applied with the same force and effect that veins of coal or ledges impregnated with gold or other minerals, as is held in such cases, does not impinge at all upon the doctrine of where the surface owner is entitled to capture and reduce to possession, oil, gas, and other hydrocarbons by bringing the same to the surface. In so doing the well of the surface owner first drilled undoubtedly draws from the oil strata underlying the surface of adjoining owners a considerable portion of the oil, gas, and other hydrocarbons that might be intercepted and brought to the surface by wells sunk upon adjoining properties. This is recognized as the common right by reason of the fact that the surface owner is entitled to capture such minerals while the same is found upon or in the oil strata underneath his surface location. The oil, gas, and other hydrocarbons, for determining the rights of surface owners to bring the same to the surface, can only be considered in place while it is passing through the oil strata beneath the surface location. Every case discussing the question of oil in place recognizes that oil, gas, and other hydrocarbons are beneath any particular surface location only for a limited portion of time, and comes more nearly within the doctrine applicable to the capture of wild animals as they pass from the lands belonging in the ownership of one person to lands belonging to some other person.

In following the doctrine of holding that minerals in place, as is applied to coal, gold, and silver mining, inapplicable by reason of the fact that oil, gas, and other hydrocarbons are only temporarily underneath a surface location, there is no intimation whatever that it was or is intended by the courts to establish a doctrine that would enable any one owning a surface location to extend or to drill a well so as to capture either oil, gas, or other hydrocarbons and bottom such wells anywhere other than beneath his own surface location.

The theory further advanced by the respondents, and accepted by the trial court, is that the owner of a surface location has a common right to sink wells and withdraw from the oil strata his proportionate share of what is called the "oil-pool," or "common property" underneath the various locations, or, rather, from the sands lying

within the total oil zone. This contention, of course, overlooks the fact that there are no means of determining what would be a surface owner's proportionate share. The statement of the theory contradicts itself and shows the fallacy of the proposition.

The Alexander property and the Alphonzo E. Bell property lie relatively over the top of the Buckbee Zone, and are therefore in a much more favorable position for the capture of oil, gas, and other hydrocarbons than properties located nearer to the exterior boundaries of the zone. This arises from the fact that the impregnation of water which renders the capture of oil from any well less commercially valuable by reason of the fact that the hydrostatic pressure fills the well with water and chokes off the gas and oil. It is therefore more desirable on the part of one drilling a well to drill what is called "up-structure" instead of "down-structure," and thus reach a portion of the underlying sand strata or oil zone which will enable the well to have a much longer life.

[1-4] The wells in question were originally drilled some time during the years 1928 and 1929, and while, as stated in the case of *People v. Associated Oil Co.*, 211 Cal. 93, 294 P. 717, 722, courts are entitled to take judicial notice of the condition and development of the petroleum industry, and said court may also take judicial notice of matters of science and common knowledge and of the physical and economic laws governing oil and gas production, it does not follow that the courts will or may take judicial knowledge of whether any particular well is drilled vertically, or whether it departs therefrom, or in what direction it will depart.

While a number of cases have been cited on the question of what the courts may or should take judicial notice, the fact that the courts do not, and cannot, from the very nature of the situation, take judicial knowledge of the direction from which a well may depart from the vertical as it is being drilled, is a complete answer to all the argument presented by the respondents of what courts may take judicial notice, and the question of what the courts will or may take judicial notice, need not be further considered. There is only one way, as shown by the cases under consideration, to determine the direction in which a well has departed from

the vertical, and that is by a survey of the particular well under consideration.

While we have been favored with a supplementary brief as to the opinions of experts with relation to the tendency of wells departing from the vertical, and while it would appear that the greater number of the wells considered departed from the vertical, it also appears that wells were surveyed where the departure from the vertical was practically negligible. This, again, absolutely controverts the argument advanced by the respondents that the mere drilling of a well is sufficient to put adjoining owners upon notice that something is being done which will surely or may reasonably be expected or anticipated to invade the property of adjoining owners, and destroys one of the foundation pillars upon which the respondents argue that the statute of limitations began to run at the time the wells under consideration were being drilled.

It appears from the supplementary brief furnished by the respondents that it was practical, and, by taking the then known means of drilling wells, a well could be kept so nearly vertical as not to encroach upon the properties of adjoining owners. The fact also appears in the record that in the early history of the production of oil, and upon properties where the sides and end lines were distant from the surface location of the well, the necessity of drilling a well as nearly perpendicular as possible did not exist. For a number of years, however—the number of which does not appear in the record—it has been possible for owners of surface tracts to drill what are called "side line" wells, in order to protect their own properties from having the oil, gas and other hydrocarbons thereunder extracted by wells on adjoining properties.

The respondents set forth that the allegations in the pleadings show that the defendants well knew it was probable that the wells being sunk on the Bell View property would enter the premises of others, and that the defendants were required to use such care as was necessary to prevent the wells from departing from within the confines of the Bell View property raises the question of a knowledge that such wells so departed, and therefore started the running of the statute of limitations. Such a conclusion, however, is illogical. All such allegations show is what the defendant knew, and

should have taken precautions to drill their wells in such a manner as not to materially depart from the lines of their own property, and not that the plaintiff or the interveners knew, or had any reason to know, that the defendants would not take the ordinary and usual precautions to capture oil from beneath the Bell View property, and that oil would be sought at such locations where due regard to the rights of others would not be violated.

[5] Again, the contention that it does not appear from the pleadings whether the wells were drilled in accordance with the generally accepted and prevailing art and drilling practice at the time the wells were drilled presents no logical basis upon which to found an argument that the complaint or pleadings filed by the interveners is defective. The mere fact that the drillers of other wells and the owners of adjoining properties may have so drilled their wells as to bottom the same where they had no right to lay the bottom of their wells, and extract oil that belonged to others, is no excuse whatever for the alleged actions of the defendants, if it be assumed that they drilled their wells and bottomed the same for the purpose of capturing oil, gas, and other hydrocarbons wherever the same could be obtained irrespective of the rights of adjoining owners. The argument of the respondents, by the mere statement thereof, is shown to destroy itself. The fact that the Bell View property covered a surface tract of only 60 by 240 feet establishes only the correlative fact that the defendants, drilling wells starting upon such a limited area, were under obligations to see that their wells did not drift so as to intercept oil passing underneath the properties of other owners, and that their right, or their correlative right, or common right of capture necessitated wells as nearly vertical as possible. The words "common supply" as used in the respondents' briefs is a misnomer. The "common supply" is not true as applied to different portions of the strata of sand known as and called Buckbee Zone. That it is a common strata of sand or oil zone may be admitted, but the supply which different owners may capture, and have a common right of capture, differs very materially as to where the wells are drilled so as to intercept the strata of oil-bearing sand called the Buckbee Zone. As we have shown, the farther up the structure a well may be drilled, the greater will be the supply. Such an

owner is in no sense of the word limited to his proportionate share, as argued by respondents and accepted by the trial court. Such an owner has been held, over and over again, to be entitled to all the oil, gas, and other hydrocarbons he can capture through the wells so located.

[6] The "common right" or "correlative right" mentioned by the courts in *Bandini Petroleum Co. v. Superior Court*, 110 Cal.App. 123, 293 P. 899, 901, and *People v. Associated Oil Co.*, supra, does not mean that the correlative right, or common right, or common supply mentioned in either one of the above cases, gives the right to bottom one's well wherever he sees fit. The common supply, or common right, or correlative right is expressly limited to the right of each individual surface owner to take from the oil strata lying beneath his properties, oil, gas, and other hydrocarbons intercepted by wells sunk beneath his own property, in such a manner as not to commit waste. Those cases involve the application of the police power of the state. The production of oil and gas is the bringing to the surface and preparing for utilization by the public of substances in which all of the people of the state are vitally interested, and therefore such production, by reason of public policy, may be controlled or limited or required to be conducted in such a manner as to yield the greatest possible return, and thus conserve the public welfare and benefit. The commercial life as well as the domestic life of every citizen of the state of California is so vitally bound up and connected with the production of oil and gas as to bring the same within the purview of the police power of the state. Such is the extent and logical conclusion only to be drawn from the two cases above mentioned, relied upon by the respondents as their right to capture oil, gas, and other hydrocarbons at any place where they may see fit to bottom their wells.

In support of the doctrine advanced by the respondents a quotation is taken from the case of *People v. Associated Oil Co.*, supra, which appeared in substance in the case of *Ohio Oil Co. v. State of Indiana*, 177 U.S. 190, 20 S.Ct. 576, 44 L.Ed. 729, as follows: "The decision in that case defines the so-called correlative right not necessarily as a right to a fixed distributive or proportional share of the oil and gas underlying the surface, which no other owner of soil overlying the same reservoir

may take and use beneficially, but as a coequal right to take whatever of the oil and gas can be captured, so long as waste, as defined by the statute, is not committed." An examination of the *Ohio Oil Company Case*, supra, shows that this statement was relative to the right of a surface owner to sink a well upon his own property and take from the oil-sands lying beneath his property all the oil, gas, and other hydrocarbons as may be so captured. Later on this will be shown by a quotation from the *Ohio Oil Company Case*. Nothing in either one of the cases supports the doctrine that the owner of a surface location has a right to take from the so-called oil reservoir oil that is not captured, or gas that is not captured, or hydrocarbons that are not captured beneath his own surface location.

The cases which we have referred to and which we will consider later on do not establish any such principle as comes within the terms "common ownership." There is no such ownership. It is simply a common right or a correlative right to capture all the oil, gas and other hydrocarbons that may be captured in wells sunk beneath one's own property. There is, in fact, no ownership of the oil and gas or other hydrocarbons not found beneath one's own property and brought to the surface and reduced to possession. This again controverts the asserted right of the respondents to capture such substances wherever they may be found.

[7] Further, it is alleged that the pleadings do not show that the wells so allowed to depart from the vertical drew more oil from what is called the "common supply" than would have been obtained had the wells been drilled vertically; that is, that the *Alexander property* and the *Alphonzo Bell property*, and the operations of the lessee thereof produced less oil than would otherwise have been produced and reduced to their possession. This contention is absolutely without merit. If the respondents had no right to trespass upon the property of the plaintiff or interveners and extract oil and gas therefrom, under the decisions the respondents never acquired any ownership of such gas and oil, and, as the cases cited hereafter show, the lessors and lessee are entitled to a judgment against the respondents for the value thereof, measured according to the circumstances of whether such wrongful taking was intentional or unintentional. The trial court's

acceptance of such a doctrine was and is clearly erroneous.

[8] The principle of the respondents, and apparently accepted by the trial court, is "that the owners of all the land embraced within the boundaries of an oil reservoir, between various points in which the oil may migrate, own all the oil in that reservoir as tenants in common." This principle has no support in a single case called to our attention. When properly interpreted, the cases cited in support of the alleged principle simply hold that the owners of the surface have a common right to drill wells beginning on their own properties, so as to capture and reduce to possession all the oil, gas, and other hydrocarbons that may be passing through the sands underlying such surface location. The "common reservoir" means the sand strata through which oil, gas, and other hydrocarbons may be passing, and is in no sense a stationary reservoir, to which each surface owner, as a tenant in common, owns a particular portion thereof. That the surface owners have a common and correlative right to take from such sand strata, oil, gas, and other hydrocarbons passing through the sands underlying his surface location, is all that the cases mean when they speak of extracting oil, gas, and hydrocarbons from a common source. It is common to the extent that every surface owner has a right to reduce to possession all of the oil, gas, and other hydrocarbons that may be intercepted by a well drilled upon his own property, and does not mean that he has any ownership in oil, gas, and other hydrocarbons that may have passed through the sands underlying his own property and into the sands underlying neighboring locations. As thus limited, the terms "common source," "common supply," and "correlative rights" may be said to have been clearly and definitely established.

Three propositions are set forth in respondents' brief upon which the trial court apparently based its decision sustaining the demurrer to which we have made reference: "1st. That because of being bottomed underneath the surface of plaintiff's land, defendant's well has extracted more oil and gas than it could have removed from the reservoir had it been bottomed within the lines of defendant's own property, that excess measuring the damage to all the other common owners of the reservoir; 2d. That plaintiff, if not the only other owner in common of the reservoir, has himself been able to capture through his wells less oil

than he would have captured if defendant's well had struck the reservoir within defendant's own property. * * * The third amended complaint in this action does not show these facts, nor either of them, and thus * * * fails to show an injury with which the courts should be concerned."

[9] As shown by the cases which we will hereafter cite, not one of these propositions is tenable; they overlook entirely the fact as to where, under the law of correlative rights, a surface owner must bottom his own wells. In other words, the extent of the injury to the plaintiff is not measured by the oil that might have been captured by the plaintiff or his lessee, or by the intervenor, but by the oil, gas, and other hydrocarbons taken by the respondents from underneath properties belonging to the plaintiff, or the intervenors. That is the extent of the damage. The respondents have gone where they had no right to go to bottom their wells, and have taken oil, gas, and other hydrocarbons belonging to persons other than the defendants, and the value thereof is the damage to the other persons, and the value thereof is the measure of such damage, not that the plaintiff or the intervenors might have captured more oil, gas, or other hydrocarbons if their wells had first intercepted the locations where the respondents bottomed their own wells.

The case of Dabney-Johnston Oil Corporation v. Walden, 4 Cal.2d 637, 52 P.2d 237, supports no such principle as that advocated by the respondents and adopted by the trial court.

We do not need to discuss the injury to the real estate, as these actions are not based upon damages suffered to the real estate but are based upon the wrongful conversion of oil, gas, and other hydrocarbons from beneath the property known as the Alexander and Bell locations leased to the Union Oil Company.

The case of *People v. Brunwin*, 2 Cal. App.2d 287, 37 P.2d 1072, 1077, while being a criminal case and showing circumstances from which we conclude that the wells were surfaced above barren properties and extended into oil and gas producing zones, differs somewhat from wells surfaced on land lying above oil and gas producing stratas, yet, if the doctrine of ownership and correlative rights, as we have set them forth, was not in principle accepted by the

trial and appellate courts, no offense could have been alleged as committed, because, in order to constitute grand theft, an owner of the property stolen must be made to appear, and, if the oil, gas, and other hydrocarbons purloined by the defendants in that case did not belong to the surface owners when brought to the surface and reduced to possession, then and in that case the defendants would have been purloining property belonging to no one.

[10, 11] As we will show hereafter by the cases cited, that no one has a right, by reason of the ownership of a surface location lying above an oil zone, to extend his oil wells without the boundaries of his own surface location, vertically, extended downward so as to trespass upon the premises of adjoining owners, a cause for an injunction to stop the trespass, or the conversion, rather, of oil, gas, and other hydrocarbons by such means, is stated, and an injunction should be granted. Likewise, the cases hereafter cited will show that all the parties involved herein either as plaintiffs or interveners have a right of action whether lessors or lessees, royalty owners, or owners as lessees. The Union Oil Company is clearly shown not to have converted the oil, gas, and other hydrocarbons to its own uses and purposes in violation of the rights of the royalty owners, but such rights have been violated according to the allegations of the complaint, which, of course, must be taken as true upon this proceeding by the action of the respondents. They are the ones who have committed the injury, are guilty of the conversion, and anyone injured by such conversion has a cause of action and properly may join either as plaintiffs or defendants, all others having an ownership or interest in the property alleged to have been converted by the respondents.

[12] Outside of the cases hereafter cited, one question answers, in the affirmative, we think conclusively, the contention of the respondents as to the right of the owners of the Alexander property to intervene: Who has converted the property from which the owners of the Alexander location are entitled to receive either oil, or its money value, as royalty? Common logic shows absolutely without citation of authority the right of the one who has thus been wronged is against the wrongdoer. The Union Oil Company as lessee has not been guilty of any conversion. That it has also been wronged and has a cause of ac-

tion does not bar the right of the owners of the Alexander property to intervene under section 387 of the Code of Civil Procedure, as an interested party, to establish and maintain their own right and seek redress for the injury suffered through the hands of the respondents in converting the oil, gas, and other hydrocarbons as alleged in the pleadings.

Reverting again to the case of *People v. Brunwin*, supra, and as a further answer to the respondents' contention that that case does not support the rule that taking oil from underneath the surface location of another owner is not wrongful, we quote from the *Brunwin* Case the following language, which shows the conclusion of the court after citing the case of *Western Oil Co. v. Venago Oil Corporation*, 218 Cal. 733, 24 P.2d 971, 88 A.L.R. 1271: "If, under the rule announced in this decision, a lessee of land having the right to drill for and reduce to possession oil in the ground, has such a title to the oil in place that he can sell and transfer it, and the transfer becomes immediately effective, no good reason is apparent why the right conferred upon him by the lease is not such that he is entitled to complain when a trespasser enters upon the leased premises and severs from the realty the very thing which is the real subject of the lease. In *Bartholomae Oil Corporation v. Delaney*, 112 Cal.App. 314, 296 P. 690, it was decided that the lessee of land under a lease which gave such lessee the exclusive right to drill, develop, and remove petroleum from the ground may maintain an action to quiet title to the leasehold interest and to the oil in place. In *Mexican Gulf Oil Co. v. Compania Trans. D. P., S. A., D.C.*, 281 F. 148, 164, the plaintiff sought to recover damages from the defendant for the taking of 6,000,000 barrels of oil from certain land in Mexico upon which the plaintiff claimed to have an exclusive right to drill for oil. The plaintiff was given judgment for the value of the oil taken. Certain language in the opinion bearing upon the question of the ownership of the oil in place is apropos to the problem which is being here considered. The court said: 'The argument of the defendant is that oil being a fugacious element is not owned by anyone until it is brought to the surface; the owner of the land does not own it if he has given the exclusive right to explore to another; that other cannot recover if he was not in possession of it. Such a re-

sult seems to me so unjust as to make the reasoning which leads to it wrong.'"

The principle of ownership necessarily affirmed in the Brunwin Case is not changed because the cases tendered for our consideration are civil rather than criminal in their nature.

That the doctrine that surface owners over a strata of sand-bearing oil, gas, and other hydrocarbons has a right to take oil therefrom at any place where such strata may be intercepted by his wells has no basis in law, we cite the following cases (parenthetically, we may state that no cases have been called to our attention which controvert the rulings had in the actions to which we now refer):

Beginning with the early case of *Bender et al. v. Brooks et al.*, 103 Tex. 329, 127 S. W. 168, 170, Ann.Cas.1913A. 559, where a similar question was considered as is presented to us for determination, the court said: "Appellants had the exclusive right as owners of the soil to take oil therefrom, and the appellee by an invasion of their right and removal of the oil, no matter how innocently, could not acquire title thereto. It follows logically that, since appellants owned the land from which Brooks extracted the oil, the oil so removed became and was the property of the appellants so soon as it reached the surface; therefore, they had a right to recover their property or its value. There is no conflict in the authorities upon the proposition that the minerals in the land continued to be the property of the landowner after it was removed from its bed or place in the soil." The court then goes on to consider whether the trespass and conversion of the oil was intentional or unintentional in order to determine the amount of damages to be awarded.

[13-15] A leading case dealing with the ownership of oil, gas, and other hydrocarbons is that of *Ohio Oil Co. v. State of Indiana*, 177 U.S. 190, 20 S.Ct. 576, 581, 44 L.Ed. 729, from which we quote the following: "Petroleum gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining for coal, and other minerals which have a fixed situs, cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land, and are a part of it, so long as they are on it or in it, or subject to his control, but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his

own land and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property. *Brown v. Vandergrift*, 80 Pa. 142; *Westmoreland, etc., Natural Gas Co. v. DeWitt*, 130 Pa. 235, 18 A. 724, 5 L.R.A. 731." Further on, in stating the rights of the owner of the surface, the court says: "Although in virtue of his proprietorship the owner of the surface may bore wells for the purpose of extracting natural gas and oil until these substances are actually reduced by him to possession, he has no title whatever to them as owner. That is, he has the exclusive right on his own land to seek to acquire them, but they do not become his property until the effort has resulted in dominion and control by actual possession."

It will be noted that the owner of the surface is confined to the exploration or drilling to obtain oil and gas to his own land, and to do so, having the exclusive right, necessarily precludes the right of any other person to drill a well so as to bottom the same under the surface of an adjoining or other landowner. Further on in the same opinion the court says: "The owner of the soil has the exclusive right to reduce to possession the deposits of natural gas and oil found beneath the surface of his land." Comment by us upon this language would not add to the force and effect of what we have just quoted, which seems to us conclusive.

To the same effect is the case of *Rich v. Doneghey*, 71 Okl. 204, 177 P. 86, 3 A.L.R. 352, where the Supreme Court of Oklahoma was considering, among other questions, the exclusive right of lessees to drill and extract oil from leased premises.

The latest case on the subject appears to be that of *Union Oil Co. of California et al. v. Mutual Oil Co. et al.*, 19 Cal.App.2d 409, 65 P.2d 896, 898, where judgment was awarded the plaintiffs, which appears to have included both the lessors and the lessees, the value of oil, gas, and other hydrocarbons extracted by the defendants from beneath the surface of the lands owned or leased by the plaintiffs. The right to recover the value of the oil, gas, etc., was sustained, but with the rule of determining the value thereof we are not now interested. The court said: "The question of whether the well was intentionally or unintentionally drilled so as to slant into plaintiffs' premises, is immaterial here. In either case a trespass was committed in the drilling of the well and the trial court further found

'that the maintenance of said Carpenter No. 1 Well and the production of petroleum therefrom constituted a continuing trespass' upon plaintiffs' premises. It also found that in the production and sale of the petroleum from said well defendant Mutual Oil Company acted not only on its own behalf, but also as the agent of the appealing defendants. Thus the appealing defendants were chargeable with trespass as well as conversion by reason of the acts of their agent, Mutual Oil Company, for 'neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are of the gist of the action' [Citing a number of cases.] "On their contention that plaintiffs were not entitled to an accounting and judgment for the value of the oil produced and sold by the Mutual Oil Company as the agent of the appealing defendants, numerous authorities are cited on the general proposition that neither the owner of real property nor his lessee has absolute title to 'oil in place.' This may be conceded. *Callahan v. Martin*, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871; *Western Oil, etc., Co. v. Venago Oil Corporation*, 218 Cal. 733, 24 P.2d 971, 88 A.L.R. 1271. The questions here are: (1) Were the lessees under a lease granting to them the exclusive right to explore and remove oil from the premises entitled to recover from a trespasser the value of oil removed by such trespasser from said premises and converted to the trespasser's use during the term of the lease? and (2) If such lessees were entitled to recover the value of the oil so removed, was it proper for the trial court in granting injunctive relief to also grant relief by way of an accounting and a money judgment for the amount found to be due from the trespasser?" These questions were resolved in favor of the plaintiff. The court in the case from which we have been quoting, refers to *People v. Brunwin*, *supra*, in support of the contention that the owner of the surface premises has the exclusive right to explore for and remove oil and gas that may be found beneath such premises. A hearing by the Supreme Court was denied on May 1, 1937.

In *Bandini Petroleum Co. v. Superior Court*, *supra*, the court supports the rule giving exclusive right to a surface owner to explore for and extract gas and oil from beneath such location, and in doing so uses this language: "We think, however, that the better reasoning, on account of the self-propelling or migratory character of natural gas, as well as oil, dictates the conclusion

that while in general we may speak of the owner of the surface as being the owner of the gas and oil in place, what we really mean is that he and he alone has the right through his own property to endeavor to reduce the substances to possession; that when they are reduced to possession and then only does he have an absolute and unqualified title thereto." The right to bore for such oil and gas is confined to the surface owner. The court in the opinion from which we have quoted states the rule as follows: "It is anybody's property who can acquire the surface right to bore for it."

[16] The rule from which foregoing cases and others may be stated is as follows: The owner of the surface has exclusive right to reduce to possession all the oil gas, migratory or otherwise, that may be found in the soil beneath the surface premises owned by the one exploring and drilling for the purpose of reducing to his possession oils and gases in such premises, or that may seep into the wells so drilled and operated where the well is bottomed beneath the surface location. This, of course, necessarily excludes the right of any other person to invade the subsurface and extract oils, gases, or other hydrocarbon substances beneath the surface premises owned by another.

In the case of *People v. Associated Oil Co.*, *supra*, while dealing with many other questions, and relied upon by the respondents, the rule is supported giving exclusive right to the surface owner to capture the gases and oils that may be found beneath the surface. This appears by the following excerpt: "They (referring to oil and gas), belong to the owner of the land, and are a part of it, so long as they are on it or in it or subject to his control; but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land, and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property." A number of cases are cited in support of this statement.

While in *Callahan v. Martin*, *supra*, the court holding that the doctrine of minerals in place as referred to coal and other stationary products is not applicable to oil and gas supports the exclusive right of the appellants, and announces the rule in these words: "But other cases unequivocally declare that the owner of land does not have an absolute title to oil and gas in place as

corporeal real property, but, rather, the exclusive right on his premises to drill for oil and gas, and to retain as his property all substances brought to the surface on his land."

The case of *Dabney-Johnston Oil Corporation v. Walden*, supra, affirms the exclusive right of the surface owner to drill on his own land and to capture the oil and gas that may be found thereunder. This case goes on to define the profit or interest of lessors and lessees in gas and oil, which is not material for us to here consider.

We do not deem it necessary to add further citations or quote from other opinions, as we think what we have said establishes the exclusive right of the surface owner to explore for and capture the oils, gases, and other hydrocarbons that may be found within the exterior lines of his surface premises extended vertically downward. No case has been called to our attention, and we have been unable in our investigations to find any case controverting the rule upheld in the foregoing citations.

[17] As to the right of the plaintiff and the interveners as well to maintain these actions, we may call attention to the fact that the leases provide for the delivery of a certain percentage of oil to the owners, and that the ownership of the lessors to the royalty oil is affirmed and reaffirmed, and that the right of the lessee to drill for, appropriate, or sell the oil is expressly made subject to the delivery of the royalty oil.

As supporting the right of the lessors to maintain the action or to become parties thereto, we may cite the case of *Mathew v. Mathew*, 138 Cal. 334, 71 P. 344, and also the case of *Mason v. United States*, 260 U.S. 545, 43 S.Ct. 200, 67 L.Ed. 396. And the right to maintain an action for the conversion thereof is likewise supported in the case of *Lusitanian, etc., Dev. Co. v. Seaboard, etc., Corporation*, 1 Cal.2d 121, 34 P.2d 139.

Other cases supporting the right of lessors to maintain actions for the conversion of royalty oil might be cited, but what we have said we think sufficient, though we will call attention further to the cases of *Hall v. Southern Pacific Co.*, 40 Cal.App. 39, 180 P. 20, and *Stackpole v. Pacific G. & E. Co.*, 181 Cal. 700, 186 P. 354.

Under the facts pleaded, are the actions which we are considering barred by the statute of limitations?

[18] In the consideration of this question our attention has been called to a certain affidavit purporting to set forth facts sufficient to put the plaintiff and interveners upon notice. This affidavit, or, rather, what the affidavit has stated therein, would, we think, constitute pertinent evidence to be considered by the trial court in determining whether the plaintiff and interveners should have discovered the trespass and conversion of oil earlier than within the three-year limit preceding the commencement of the actions, but upon these appeals we are confined to the pleadings, and not to the evidence which may be submitted or introduced upon the trial of the respective actions.

[19] In addition to what we have said, the pleadings contained the following allegations as to discovery and knowledge, to wit:

That in March, 1934, the plaintiff and interveners learned that Bell View Grohs Well No. 2 and Bell View Grohs Well No. 3 had been so drilled as to penetrate the sub-surface of the premises owned by the Alexander people and also by the Alphonzo E. Bell Corporation, and that said wells were bottomed beneath such properties. In 1935, the plaintiff and interveners first learned that a directional survey had been made by the Bell View people; that prior thereto, when questioned by officers of the Union Oil Company, the Bell View people had denied that any such directional survey had been made, when, as alleged in the pleadings, such a survey had been made; that the logs kept by the Bell View people were concealed and had not been inspected until an order for inspection was made by the court. It is also alleged that the depth of the wells were not truly stated, and that incorrect reports were made to the State Division of Oil and Gas, which would disarm any one interested from suspecting that the oil and gas being produced by the Bell View people came from other than their own property. The nature of the conditions involved and presented of the properties upon this appeal introduce the question of natural concealment, which we think shows that the statute of limitations, Code Civ.Proc. § 338, as amended by St.1935, p. 1673, did not begin to run at the time contended for by the respondents, to wit, at the time of the bottoming of the wells within the premises, and the beginning of taking oil from the Alexander and Alphonzo Bell properties.

While the appellants cite the case of *Liles v. Producers' Oil Co.*, 155 La. 385, 99 So. 339, and *Findley v. Warren*, 248 Pa. 315, 94 A. 69, that recovery may be had for the value of the oil extracted within three years preceding the beginning of the action, we think the pleadings are sufficient to carry the period of recovery back to the time of the beginning of the extraction of oil and gas through the Bell View wells. Considering that these cases are governed by what is said in *Lightner Mining Co. v. Lane*, 161 Cal. 689, 120 P. 771, 776, Ann. Cas.1913C, 1093, we deem it unnecessary to extend the length of this opinion by analyzing the cases upholding that the statute does not begin to run to bar an action for a continuing trespass or conversion as that principle is stated in cases for the abatement of a nuisance.

[20-23] The contention of the respondents that the surface operations carried on on the Bell View properties constituted a visible notice to the plaintiff and interveners of a possible or probable trespass upon properties belonging to the plaintiff and interveners is untenable. The presumption that no one intends to violate the law or take from and convert the property of another is a direct answer to any such contention. The court certainly cannot take judicial notice that the surface operations in drilling an oil well is an indication that the parties drilling the well intend to convert to their own use properties belonging to other people. In other words, there is absolutely nothing in the mere fact of drilling and operating a well by one person to indicate to another that such other person's rights are being invaded. The whole proceeding is a concealed operation by the wrongdoer. The language used in the *Lightner Case*, *supra*, is pertinent here. Referring to the case of *Bulli C. M. Co. v. Osborne*, L.R.App.Cas. 351, we find the following: "The court also declared that, to constitute a fraudulent concealment of such a trespass, it was not necessary to show that the wrongdoer had taken active measures to prevent detection. It is one of the cases where the fraud 'conceals itself.'"

In the present case the pleadings show active measures taken to prevent discovery of the sources from which the oil, gas, and other hydrocarbon substances were being obtained.

In further considering the question of concealment, it is said in the *Lightner*

Case: "Such an act, so committed, has all the substantial elements of fraud. Where one by misrepresentation induces another knowingly to part with his property, because his mind is so beclouded by the falsehood that he is unaware of the wrong done him, it is called a fraud. It is a taking of another's property without his knowledge of the fact that it is really taken from him. The ignorance in that case is produced by artifice. Where one betrays a trust and appropriates trust property to his own use, it is called a fraud. The injured party allows the other to have the possession and the opportunity to convert the property secretly, because of faith and confidence in the wrongdoer. In the case of underground mining of a neighbor's ore, nature has supplied the situation which gives the opportunity to the trespasser to take it secretly and causes the ignorance of the owner. Relying upon this ignorance, he takes an unfair advantage of his natural opportunities, and thereby clandestinely appropriates another's property while appearing to be making only a lawful use of his own. The act in its very nature constitutes the deceit which makes it a fraud. It is a daily false representation that the ore he is taking is his own, with full knowledge that it belongs to another, and that that other is deceived by the artifice."

In the case at bar the very nature of conditions presented show a continued concealment on the part of the Bell View operators. They were not only operating or conducting a proceeding by which nature furnished all the elements of concealment, but made incorrect statements when inquiries were made which, if answered correctly, would have led to the discovery of the conversion of the oil and gas, and likewise made, according to the allegations in the complaint, incorrect statements to the state division of oil and gas which would tend to disarm suspicion.

In 37 A.L.R., beginning on page 1182, are quoted a number of cases supporting the rule which we think applicable here, that the statute of limitations begins to run only from the date of the discovery of the wrongful conversion of the oil and gas by the Bell View operators.

In the case of *Lewey v. H. C. Frick Coke Co.*, 166 Pa. 536, 538, 31 A. 261, 28 L.R.A. 283, 45 Am.St.Rep. 684, a case where the plaintiff had not mined his own land and had no means of knowing that

the defendant had extended his operations beyond his line, it was held that the running of the statute of limitations against a cause of action for removal of coal from a stratum beneath the surface of land, by wrongfully extending a mine under lands of other owners, begins only to run from the time of actual discovery. The court in that case also goes on to state that the natural conditions brought into bearing the principle of concealment.

[24] We do not need to quote further from the cases contained in the extended note, but will confine ourselves to the simple statement that the rule is well supported that the statute does not begin to run until the discovery of the conversion by the secret means of underground operations.

All the cases having to do with surface trespassers necessarily involve the rule of visible notice, of which every person is supposed to acquire sufficient information to put himself upon further inquiry as to whether his rights are being invaded. In other words, the rule of permanent and visible structures has no application whatever to underground and secret operations, in beginning the operation or application of the statute of limitations. By the very nature of the underground operations, the fraudulent conversion of another's property continues to be a fraudulent conversion of such property every day that it is continued, and the statute never begins to run unless there are certain circumstances which lead to the discovery of the fraudulent conversion. In the case at bar such discovery and knowledge were not actually obtained by the plaintiff and interveners until a directional survey had been made of the premises after obtaining an order of the court sometime in the year 1935.

[25] In further consideration of the statute of limitations, the constitutionality and application of section 349¾ of the Code of Civil Procedure, as added by St. 1935, p. 2285, is discussed by counsel for both appellants and respondents. The

record shows, however, that all of the parties were before the court preceding the expiration of the 180 days mentioned in the section of the Code just referred to. The Union Oil Company had appeared, filed a petition for leave to intervene, but, as actual leave was not granted by the court until after the expiration of the 180 days, the right of the Union Oil Company could not be prejudiced by the failure of the court to act upon the application prior to the expiration of the 180 days. The Union Oil Company had appeared in the case within the 180 days, and that we deem sufficient. This relieves us from any discussion as to the validity or invalidity of section 349¾ supra.

We do not find anything in the special demurrers which really affects the merits of the cases under consideration, and therefore will not extend the length of this opinion by analyzing the same in detail. Nor does there appear to be anything of merit in the contention of laches urged by the respondents.

From what we have set forth herein, it necessarily follows that the orders of the trial court sustaining the demurrers to the pleadings of the plaintiff and the interveners are all erroneous; likewise, the orders denying the privilege to file additional pleadings as tendered by the respective parties.

The judgment of dismissal in the case in which we are writing this opinion, civil No. 5927, is reversed, and the cause remanded to the trial court to overrule the demurrers interposed by the defendants, and to grant leave to the plaintiff and interveners to file additional pleadings, if so advised, giving to the respondents such time as may be just to file answers thereto. Corresponding orders will be made in each one of the other cases mentioned in the opening portion of this opinion.

We concur: PULLEN, P. J.; THOMPSON, J.

24 Cal.App.2d 630

WILLIAMS et al. v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 5920.

District Court of Appeal, Third District, California.

Jan. 31, 1938.

Rehearing Denied March 2, 1938.

Hearing Denied by Supreme Court
March 31, 1938.**1. Pleading ⚡345(1)**

In suit to quiet title to realty and water rights and to enjoin defendant from diverting waters from plaintiffs' lands, complaint describing tracts specifically, and alleging that plaintiffs had acquired water rights and that defendant had constructed dams and had diverted and threatened to continue to divert waters to plaintiffs' irreparable damage, stated good causes of action to quiet title to realty and to alleged water rights incident thereto, and trial court erroneously rendered judgment on the pleadings against plaintiffs.

2. Quietling title ⚡34(1)

In an ordinary suit to quiet title, it is sufficient for plaintiff to allege in simple language that he is the owner and in possession of the land and that defendant claims an interest therein adverse to plaintiff.

3. Quietling title ⚡44(2)

In suit to quiet title, plaintiff may prove not only that he holds record title to property, but also that he acquired title by adverse possession.

4. Pleading ⚡350(3)

On a motion for judgment on the pleadings, allegations of the complaint must ordinarily be accepted as true, the same as on demurrer.

5. Pleading ⚡6

In suit to quiet title, the court in determining sufficiency of allegations of complaint on demurrer may take judicial notice of official records of United States land office affecting title to land involved. Code Civ.Proc. § 1875, subd. 3.

6. Waters and water courses ⚡152(7, 10)

In suit to quiet title to land and water rights, and to enjoin municipality from diverting water from plaintiffs' land, plaintiffs were entitled to have title to land determined independently of asserted water rights, even if patents issued to them conveyed no title to water rights because issued subsequent to enactment of Desert Land

Act, and plaintiffs were entitled to prove water rights which they may have acquired by occupancy and possession prior to enactment of act. Desert Land Act 1877, as amended, 43 U.S.C.A. § 321 et seq.

7. Waters and water courses ⚡152(7)

In suit to quiet title to land and water rights, and to enjoin municipality from diverting water from plaintiffs' land, plaintiffs could prove their title to land irrespective of their water rights and also whatever water rights they may have acquired under California customs and laws, even though they acquired title by patents issued subsequent to enactment of Desert Land Act, since state in which arid land granted by government is located may fix extent of water rights by legislation or acknowledgment of rules and customs. Desert Land Act 1877, § 1, as amended, 43 U.S.C.A. § 321; Const. art. 14, § 3, adopted in 1928.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Suit by Dan E. Williams and wife and others against the City and County of San Francisco to quiet title and for injunctive relief to prevent defendant from continuing to divert waters from a certain river and from plaintiffs' lands. From a judgment for defendant on the pleadings, plaintiffs appeal.

Reversed, with directions.

Charles F. Blackstock, of Oxnard, and Andrew R. Schottky, of Merced (Glenn J. Fairbrook, of Seattle, Wash., of counsel), for appellants.

John J. O'Toole, City Atty., Dion R. Holm, Asst. City Atty., and A. E. Chandler, Sp. Counsel, all of San Francisco, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiffs have appealed from a judgment on the pleadings which was rendered against them. The complaint is couched in two counts. The first cause of action is a simple suit to quiet title to several tracts of land in Tuolumne county owned and possessed by the respective plaintiffs. The second cause of action alleges that these tracts of land border on the Tuolumne river from which for many years the plaintiffs have appropriated and used the waters to irrigate their respective tracts and for domestic pur-

poses, which water rights thus acquired they also seek to have quieted; that the defendant has constructed dams and works above the lands of plaintiffs, and has thereby diverted and threatens to continue to divert the waters of that river from its natural channel and from the lands of plaintiffs to their irreparable damage. In this second cause of action the plaintiffs seek injunctive relief to prevent the defendant from continuing to divert the waters from the Tuolumne river and from their lands. It appears from an exhibit attached to the complaint that plaintiffs' lands were originally acquired as placer mining claims. The several tracts are specifically described, but neither the sources of their titles nor the dates when they were acquired appear in that pleading.

In an elaborate answer the essential allegations of the complaint are denied. It is alleged the defendant is a municipal corporation which, in the name of the Hetch Hetchy project, has, for many years, appropriated and used, under the authorization of the Raker Act, 43 U.S.C.A. §§ 511-513, large quantities of water from the Tuolumne river and adjacent streams to supply the inhabitants of San Francisco with water for domestic purposes and for hydro-electric power. The manner of acquiring its water rights, together with the approximate quantity used and the cost of constructing and maintaining its dams, reservoirs, power houses, works, and equipment are specifically alleged. The answer then denies that the defendant has wrongfully diverted or that it intends to divert or use any of the waters of the Tuolumne river necessary for beneficial purposes on the plaintiffs' land; that because of plaintiffs' knowledge and acquiescence in defendant's appropriation and use of the waters of that river for many years past they are now estopped from denying its title thereto. It is asserted the defendant has thereby acquired title to the water thus diverted by adverse possession; that this action is barred by the provisions of sections 318, 319, and 338 of the Code of Civil Procedure, and by section 1007 of the Civil Code, and by article 2, chapter 2, section 8, of the charter of San Francisco.

Upon motion of the defendant, judgment on the pleadings was rendered against the plaintiffs to the effect that they take nothing by their action. This judgment was granted on the theory that the court will take judicial notice of the records of the United

States land office which discloses the fact that plaintiffs acquired title to their respective tracts of land by patents from the government which were issued to them subsequent to March 3, 1877, when the Desert Land Act was enacted (as amended, 43 U.S.C.A. § 321 et seq.), by the terms of which all water rights were reserved in the federal government, and that plaintiffs therefore acquired no title to the waters of Tuolumne river as riparian owners of land adjacent thereto or otherwise.

Two questions are presented on this appeal: First, on a motion for judgment on the pleadings, as distinguished from a trial on the merits of a cause, may the court take judicial notice of the patents issued by the United States land office to supply the dates and sources of title so as to defeat an otherwise adequate statement of a good cause of action to quiet title to real property? Second, do conveyances of lands from the government subsequent to the enactment of the Desert Land Act, March 3, 1877, preclude the owners thereof from acquiring riparian water rights incident to the lands in an arid land district under constitutional provisions and statutes existing in such jurisdictions with relation thereto?

[1] We are of the opinion the complaint states good causes of action both to quiet title to the real property and to alleged water rights incident thereto, and that the court therefore erroneously rendered judgment on the pleadings against the plaintiffs without affording them the opportunity of a trial upon the issues tendered.

[2, 3] The cause of action based upon a suit to quiet title to the real property is couched in the usual language which has been approved in innumerable authorities. Certainly that count states a good cause with respect to the title of the land irrespective of the water rights incident thereto. In an ordinary suit to quiet title it is sufficient for the plaintiff to allege in simple language that he is the owner and in possession of the land and that the defendant claims an interest therein adverse to him. 22 Cal.Jur. 146, § 28; 17 Cal.Jur. 524, § 168. In such a suit the plaintiff is entitled to prove not only that he holds the record title to the property, but also that he acquired title by adverse possession. In the case entitled *President & Presiding Elder, etc., v. Goodwin*, 119 Cal.App. 37, 5 P.2d 973, it was held the court erred in confining plaintiff to proof of its record title to the

real property and in rejecting its offer to prove title thereto by adverse possession.

[4-6] Upon a motion for judgment on the pleadings, like a demurrer to a complaint, the allegations of the pleading must ordinarily be accepted as true. *Hibernia Savings & Loan Society v. Thornton*, 117 Cal. 481, 49 P. 573; *Bates v. Escondido Union High School District*, 133 Cal.App. 725, 24 P.2d 884. In determining on demurrer the sufficiency of the allegations of a complaint the court may take judicial notice of the official records of the United States land office affecting the title to land which is involved in the suit. *Livermore v. Beal*, 18 Cal.App.2d 535, 540, 64 P.2d 987; section 1875, subd. 3, Code Civ.Proc. But assuming that the United States patents to the plaintiffs' lands conveyed no title to water rights incident thereto when they are issued subsequent to the enactment of the Desert Land Act of March 3, 1877, which we do not concede, the plaintiffs would still be entitled to have the title to their lands determined in this suit independently of their asserted water rights. Moreover, they would also be entitled to prove any water rights incident to such lands which they may have previously acquired by occupancy and possession of the land prior to the enactment of the Desert Land Act. Such rights are uniformly recognized.

[7] We are also satisfied the court erred in assuming from the mere inspection of certified copies of United States patents to plaintiffs' respective tracts of land, which appear to have been issued subsequent to the adoption of the Desert Land Act, March 3, 1877, with the exception of the plaintiff Louis Harris' land, that plaintiffs, since they took title to public lands in an arid land district after March 3, 1877, therefore possessed no riparian or other water rights incident to their lands and could acquire no water rights under the Constitution or statutes of California. The case of *California Oregon Power Company v. Beaver Portland Cement Company et al.*, 295 U.S. 142, 55 S.Ct. 725, 726, 79 L.Ed. 1356, upon which the respondents rely, does not so hold. The plaintiffs are therefore entitled to prove at a trial of the issues of this case title to their real property and whatever riparian or other water rights they may have acquired. The Desert Land Act, § 1, as amended, U. S.C.A., title 43, p. 272, § 321, upon which the respondents rely, reads in part: "It shall be lawful for any citizen of the United States * * * to file a declaration under

oath with the register * * * of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one-half section, by conducting water upon the same, within the period of three years thereafter: Provided, however, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights."

After a diversity of opinions in various jurisdictions regarding the effect of the Desert Land Act upon water rights incident to real property acquired from the federal government after March 3, 1877, the leading case of *California Oregon Power Company v. Beaver Portland Cement Company*, supra, was decided by the Supreme Court of the United States in 1935, construing that act in its application to such water rights. From a careful reading of that opinion it seems clear the United States Supreme Court determines that the language of the Desert Land Act above quoted does not withhold or abrogate from conveyances of public lands in arid districts subsequent to March 3, 1877, the riparian or other water rights conferred by the provisions of Constitutions or statutes of the respective jurisdictions in which the land is situated. On the contrary, we are of the opinion the *California Oregon Power Company* case holds that, by conveying from the federal government public lands in an arid district after March 3, 1877, it is implied that the grantee shall take title to the real property and to such water rights incident thereto as may be recognized and conferred by local laws, customs, and judicial decisions of the jurisdictions in which the lands are situated.

In the case last mentioned, the petitioner, which is a public service corporation, owned a tract of land bordering on the east side of Rogue river in Oregon. Its predecessor took title to the land under the Federal

Homestead Act May 20, 1862, 12 Stat. 392, in 1885. On the west side of the Rogue river, opposite the petitioner's property, the respondent occupied land under a contract of purchase from the city of Gold Hill, which was the owner thereof. The title to the property of each litigant extended to the thread of the stream. Neither party to that suit had ever diverted or used water from the Rogue river for the benefit of their respective lands. Both parties claimed under the common law as riparian proprietors. The petitioner claimed its water rights attached to the land as a necessary part thereof when the patent to the homestead was issued from the government to its predecessor in 1885. The respondent was blasting out the bed of the river on its side of the stream to clear the channel for a better flow of water and to obtain rock with which to construct a dam and other works for a power plant. The petitioner sought to enjoin the respondent from so doing on the ground, among others, that its acquired riparian water rights entitled it to have the surface of the river maintained at the normal elevation at which it was accustomed to flow over and upon its property.

It is difficult to determine just what riparian or appropriative water rights were recognized in Oregon prior to the adoption of its Water Code in 1909. Laws Oregon 1909, c. 216, p. 319. That Code definitely provides that all water within the state is subject to appropriation for beneficial use, except that all water rights previously vested are specifically preserved to the owners thereof. With respect to riparian rights the Oregon Water Code declares that vested rights shall be limited to an "actual application of water to beneficial use prior to the passage of this act * * * to the extent of the actual application to beneficial use." Page 340, § 70. It will be observed the Supreme Court asserts, with respect to those litigants that: "Neither petitioner nor any of its predecessors in interest has ever diverted the waters of the river for beneficial use on the real property or sought to make an actual appropriation thereof."

The petitioner's riparian rights as declared by the provisions of the Oregon Water Code were therefore not invaded. Nevertheless, the lower court held: "(1) That the homestead patent of 1885 carried with it the common-law right to have the stream continue to flow in its accustomed channel, without substantial diminution; but (2) that, while this was a substantial property

right which could not be arbitrarily destroyed, it nevertheless was subject to the police power of the state and might be modified by legislation passed in the interest of the general welfare."

The Supreme Court therefore recognized the binding validity of the common-law riparian rights, although they were held to be subject to police power of the state of Oregon to modify that principle for the general welfare of the public. And so the validity of the Oregon Water Code was sustained, but the judgment of the lower court was affirmed and the respondent was enjoined from carrying out operations which would result in reducing the flow of Rogue river below its normal level. That decision is itself a recognition of the validity of prior water rights vested under "customs, laws and judicial decisions of the state of their location."

In construing the application of the Desert Land Act to water rights of every nature incident to lands which were thereafter conveyed, the Supreme Court said that subject to prior vested water rights acquired by appropriation: "As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. * * * The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. * * * The only exception made is that in favor of existing rights; and the only rule spoken of is that of appropriation. It is hard to see how a more definite intention to sever the land and water could be evinced. The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein, with the result that the grantee will take the legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the state of their location."

It may not be contended that Congress has not delegated and conferred upon the Legislatures of the various so-called arid states the power to fix and determine the grantee's water rights incident to land conveyed by the government under the Desert

Land Act. In the sentence following the preceding quotation, the court said: "If it be conceded that in the absence of federal legislation the state would be powerless to affect the riparian rights of the United States or its grantees, still, the authority of Congress to vest such power in the state, and that it has done so by the legislation to which we have referred, cannot be doubted."

There can be no question from the preceding quoted language of the Supreme Court but that the water rights of a grantee of arid land from the government carries with it the absolute authority of the state in which it is located to fix and determine the extent thereof by appropriate legislation, or by acknowledgment of rules and customs with respect thereto. The court specifically says in that regard: "Nothing we have said is meant to suggest that the act, as we construe it, has the effect of curtailing the power of the states affected to legislate in respect of waters and water rights as they deem wise in the public interest."

Finally, to foreclose the possibility of misconstruing the language of the opinion, the court says: "What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain."

It is therefore not true, as the respondent contends, that the appellants in this case possess no water rights incident to their lands merely because their titles were acquired from the government by patents issued subsequent to the adoption of the Desert Land Act. As the Supreme Court has definitely held, they may be entitled to any water rights which have been recognized and fixed "by the customs, laws, and judicial decisions of the state" of California.

Riparian rights to the beneficial use of water upon lands in this state adjacent to rivers and streams have been recognized by law and are uniformly upheld by the California courts. 25 Cal.Jur. p. 1060, § 58 et seq.; article 14, § 3, Const. of Calif.; *Peabody v. City of Vallejo*, 2 Cal.2d 351, 40 P.2d 486; *City of Los Angeles v. Aitken*, 10 Cal.App.2d 460, 472, 52 P.2d 585. By the

adoption of article 14, § 3, of the Constitution in 1928, riparian rights are now limited to the "use or flow of water in or from any natural stream or water course in this State * * * to such water as shall be reasonably required for the beneficial use to be served. * * * Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled."

In support of the doctrine that it has always been the policy of the United States to leave the vesting and control of private water rights to the several states in which the land is situated, it is said in the *Peabody Case*, supra, 2 Cal.2d 351, at page 366, 40 P.2d 486, 491: "The attitude of the Supreme Court of the United States has been consistent in leaving the question of private water rights, which do not involve federal or interstate interests, to the control of local state policies."

Numerous federal cases to that point are cited.

We do not hesitate to say that uniform policy of the Supreme Court of the United States has not been changed by the adoption of the Desert Land Act in question, as is evidenced by the reiteration of that principle in the California *Oregon Power Company Case*, supra.

It follows that the appellants should have been given the opportunity to prove their titles to the respective tracts of land which they own irrespective of their water rights, and that they should also have been permitted to prove whatever water rights they may have acquired under the customs and laws of the state of California.

The judgment is reversed, and the trial court is directed to proceed to trial at its convenience on the issues presented by the pleadings in this cause.

We concur: PULLEN, P. J.; PLUMMER, J.

25 Cal.App.2d 14

PEOPLE v. GALENO.

Cr. 1975.

District Court of Appeal, First District,
Division 1, California.

Feb. 9, 1938.

1. Criminal law §1134(3)

The appellate court need not consider whether complaining witness was accomplice, where his testimony was sufficiently corroborated.

2. Criminal law §511(2)

Evidence in trial for infamous crime against nature held sufficient to corroborate complaining witness' testimony as clearly connecting defendant with commission of offense charged, so as to render such testimony fully effective, even if such witness was accomplice. Pen.Code, § 286.

3. Sodomy §6

Testimony in trial for infamous crime against nature that defendant said he wanted to do to witness what he did to another boy, with whom three counts of information charged that defendant committed such crime, that witness and defendant committed same offense, and that defendant paid witness small sum of money thereafter, was admissible on such counts, but not on fourth count naming such witness as participant in another such offense. Pen.Code, § 286.

Appeal from Superior Court, Alameda County; Edward J. Tyrrell, Judge.

Alexander Galeno was convicted of the infamous crime against nature and an attempt to commit such offense, and he appeals.

Affirmed.

Willard W. Shea, Public Defender, and Hugh Kenneth Forsman, Asst. Public Defender, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

PER CURIAM.

By an information filed in the superior court of Alameda county the defendant was charged with four violations of section 286 of the Penal Code, which punishes as a penal offense the infamous crime against nature.

The information contained four counts, the first three of them charging the act to

have been committed with one Terrence Mullin, and the fourth specifying one Robert Edmundson as the participant. He was found guilty on counts 1 and 2; on count 3 he was convicted of an attempt to commit the offense; and, following the court's instructions, was acquitted on the fourth count on the ground that Edmundson was an accomplice and his testimony incriminating the defendant was not corroborated. The defendant was sentenced to imprisonment on each of counts 1, 2, and 3, the terms to run concurrently. He appeals from the judgment, and makes two contentions, viz., that Terrence Mullin, the complaining witness, who testified in detail as to the occurrences in which he took part, and whose testimony was uncontradicted, was an accomplice, and, second, being an accomplice, the necessary corroboration of his testimony was not forthcoming.

[1] As we are of the opinion that the testimony offered and received in corroboration was abundantly sufficient for its purpose, it will not be necessary to consider or decide whether appellant's first point is well taken.

[2] The evidence in the case shows that along in the middle of December, 1936, Terrence Mullin, then between 13 and 14 years of age, was engaged evenings in selling newspapers in the vicinity of Fortieth street and San Pablo avenue, Emeryville. On or about the 15th of that month the appellant, at about 7 or 8 o'clock in the evening, accosted Mullin and suggested that if he would go home with him he would give him some money. Mullin replied that he could not go until he had finished his newspaper selling, which would be about midnight. Appellant returned at that time, and the two repaired to a dwelling house in which the former roomed and went to his bedroom. They were let into the house by one Lee Carpenter, who as a witness so testified. Mullin gave evidence as to what occurred in the room, and from it it is clear that the conduct forbidden by the section of the Penal Code above referred to was engaged in. About the same hour on the following evening appellant again sought Mullin at Fortieth street and San Pablo avenue, and the proceeding of the previous evening was repeated. Again, two nights later, Mullin accompanied appellant to his room; and the evidence as to what occurred on this occasion shows but an unsuccessful attempt to commit the same offense. On each occasion

appellant gave to Mullin a small sum of money.

Robert Edmundson, a boy 15 years of age, with whom the offense charged in the fourth count was committed, appeared as a witness at the trial. He, like Mullin, was engaged in the occupation of selling newspapers in the evening and in the same locality. A few nights after the meeting of appellant and Mullin last referred to, appellant again came to the vicinity of Fortieth street and San Pablo avenue. He there met Edmundson and inquired of him the whereabouts of the "boy with the big hat"—this description, it is conceded, referring to Mullin, who was in the habit of wearing such a hat; and again, several nights later, returned and made of Edmundson the same inquiry. Edmundson was unable to give the desired information, whereupon appellant invited him to accompany him to his room, which he did. As to what appellant said to him on this occasion and later in the room the boy testified: "He said he wanted to do the same thing to me that he had done to the guy with the big hat. * * * He said 'It won't hurt you very much'"; and again, "I will do to you what I did to Mullin." Edmundson's testimony then shows that the offense in question was committed by them; that appellant paid him a small sum of money; and that Edmundson then departed, nothing further being requested of him.

We regard this testimony of Edmundson as strongly corroborative of that given by Mullin, the so-called accomplice. If this witness had testified that the defendant said to him in so many words that he had committed the offense with Mullin, such testimony would hardly have been stronger than the inference afforded by the testimony as given. The almost irresistible inference is that the defendant, wishing to continue his improper relations with Mullin, and failing to find him at his usual haunts, conceived the idea that Edmundson, whose acquaintance he incidentally made while seeking Mullin, could be induced to act Mullin's part, invited him to his room for that purpose, and that what there occurred between defendant and Edmundson was precisely what had taken place between defendant and Mullin—the thing which would not "hurt very much," which had to be committed in the privacy of a bedroom, and for which some payment would be expected by the complacent participant. This evidence clearly connects the defendant with the

commission of the offense with Mullin, and, that being so, renders fully effective the latter's testimony, assuming he was in law an accomplice.

[3] It is suggested by appellant that this testimony of Edmundson, so far as it relates to Mullin, was not admissible on the three counts of the information which concerned him, but was directed to and admitted on the fourth count only. There is nothing in the record which suggests such limitation, nor any reason advanced why it was not admissible on those counts; indeed, those are the only counts on which it was properly admissible, for, considered as going to the fourth count, it was merely evidence of similar offenses; and it is not contended that the present is one of that class of cases in which such evidence is admissible.

For the foregoing reasons, the judgment is affirmed.



24 Cal.App.2d 728

LOS ANGELES COUNTY FLOOD CONTROL DIST. v. ABBOT et al.

Civ. 11350.

District Court of Appeal, Second District,
Division 1, California.

Feb. 7, 1938.

Hearing Denied by Supreme Court
April 8, 1938.

1. Waters and water courses Ⓒ39

The owners of lands through which the waters of a seasonal wash or arroyo flow during the rainy season are "riparian" owners.

The word "riparian" is defined as relating to the bank of a stream or other water, a river, lake or sea; the Latin word "ripa" meaning shore of a river.

[Ed. Note.—For other definitions of "Ripa" and "Riparian," see Words & Phrases.]

2. Waters and water courses Ⓒ40

The rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure naturæ* because the land has by nature the advantage of being washed by the stream.

3. Waters and water courses Ⓒ42

Flood waters, when of no benefit to a riparian owner or to his land and not used

by him, may be taken at will by any person who can lawfully gain access to the stream.

4. Waters and water courses ⚡40

The natural flow of water of a stream is annexed to the soil, not as an easement or appurtenance, but as a parcel.

5. Eminent domain ⚡98

Where defendants purchased land through which the seasonal waters of a wash flowed and on which, in periods of high water, they washed a considerable supply of sand and gravel, and constructed bunkers and equipment for sifting the sand and gravel, which they sold commercially, and for over 30 years no one alleging superior rights attempted to interfere with this use of the land, they were entitled to severance damages upon construction of a channel for such waters to prevent floods which would prevent the waters from flowing across defendants' land.

6. Waters and water courses ⚡127

The collection, sifting, and sale of rock, sand, and gravel washed upon land in the rainy season by the waters of a wash constituted a beneficial use of the waters which became a property right vested in the owners of the land by 30 years of usage.

7. Waters and water courses ⚡132

Water, to be put to a beneficial use, need not be utilized for irrigation or domestic purposes alone.

8. Waters and water courses ⚡132

The use to which water is put by one who collects, sifts, and sells sand, gravel, and rock washed upon his land during the rainy season by the waters of a wash does not contravene the constitutional provision requiring water resources to be put to beneficial use to the fullest extent of which they are capable, and providing that the right to water or to the use or flow of water shall be limited to such as shall be reasonably required for the beneficial use to be served. Const. art. 14, § 3, adopted in 1928.

9. Appeal and error ⚡1004(1)

Where the amount of damages awarded to landowners because of the construction of a flood control channel is supported by substantial evidence, an appellate court will not set the verdict aside.

10. Trial ⚡139(1), 140(1)

The credibility of witnesses and the intrinsic weight and value of testimony are questions for the jury.

11. Eminent domain ⚡202(1)

The condition of property, the use to which it has been put, the existing advantages for making a practical use of the property, and such advantages as may be reasonably expected in the immediate future are all matters for consideration in estimating the value of lands taken under the power of eminent domain.

12. Evidence ⚡66, 474(16)

Owners are presumed to know the value of their property, and permitted to testify thereto, and their evidence in that regard is entitled to be weighed and considered by the jury in determining the damages from the construction of a flood control channel.

13. New trial ⚡76(1)

A new trial may not be granted because the verdict seems large, or because it is larger than the court, if sitting as a jury, would have given, but only where it appears that it was given under the influence of passion or prejudice. Code Civ.Proc. § 657.

14. Appeal and error ⚡1004(1)

A verdict will not be disturbed as excessive unless the damages awarded are so excessive as to indicate that the jury acted under the influence of passion or prejudice. Code Civ.Proc. § 657.

15. Trial ⚡296(11)

In an eminent domain proceeding to acquire a flood control channel, instructions that the damages were tortious in nature, and that the damages likely to result from a tortious injury to property must be taken as the basis of the compensation, did not require reversal, where a reading of all the instructions given by the trial court and a consideration of them as a whole indicated that the jury was fully, correctly, and fairly instructed as to the measure of damages.

16. Trial ⚡296(1)

It is not proper for a reviewing court to take one isolated instruction and consider it alone, separate and apart from the other instructions given.

17. Trial ⚡295(1)

Instructions must be considered in their entirety, and if when so considered they state the law of the case fairly and clearly, they are as a whole unobjectionable, even though some isolated passages from a single instruction are amenable to criticism.

18. Eminent domain ⇨224

In an eminent domain proceeding to acquire land for a flood control channel involving a question as to the value of land on which waters of a wash deposited rock, sand, and gravel, the misconduct of a juror in making inquiry of the city engineer as to the value of rock, sand, and gravel from such deposits did not require a new trial of the claim of a different owner whose land was not riparian and who was not receiving any rock, sand, or gravel from the wash.

19. Eminent domain ⇨224

In an eminent domain proceeding to acquire land for a flood control channel involving a question as to the value of land on which the waters of a wash in the rainy season deposited rock, sand, and gravel, the misconduct of a juror in making inquiry of the city engineer as to the value of rock, sand, and gravel from such deposits did not require a new trial, where she did not communicate her information to the other jurors and, on a poll of the jury, 10 jurors declared the verdict as rendered to be theirs, and the juror in question was one of the two opposed to the verdict.

20. New trial ⇨56

To warrant the setting aside of a verdict for misconduct of a juror, it must appear that prejudice resulted therefrom.

DORAN, J., dissenting.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Eminent domain proceeding by the Los Angeles County Flood Control District against J. R. Abbot, Jr., and others. From a judgment in favor of defendants Leota Allen Carroll, Jacob H. Yonker, and Kathryn L. Yonker, plaintiff appeals.

Affirmed.

Everett W. Matton, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, both of Los Angeles, for appellant.

John M. Dvorin, and Holbrook, Taylor, Tarr & Reed, all of Los Angeles, for respondents.

WHITE, Justice.

This is an appeal by plaintiff from a judgment of the superior court of Los Angeles county awarding damages to defendants Jacob H. Yonker, Kathryn L. Yonker, and Leota Allen Carroll, as owners of real property, in an eminent domain proceeding

instituted by Los Angeles County Flood Control District, which district sought to acquire an easement over said property for the construction of a flood control channel to confine and carry the waters of what is known as Alhambra wash. Following commencement of the action, on March 10, 1936, a sum fixed by the court was deposited by plaintiff district for immediate possession, whereupon the trial court ordered such immediate possession of all parcels in the proceeding, including those here involved.

The trial as to both the Yonker and Carroll parcels with which we are here concerned was consolidated by order of the trial court and heard before the same judge and jury. A verdict was returned by the jury awarding defendants Yonker \$1,335 for the value of their parcels of land taken and \$24,140 as severance damages, while defendant Carroll was by the verdict awarded \$100 for her parcel of land taken and \$3,000 as severance damages. Findings of fact, conclusions of law, and interlocutory judgment of condemnation having been signed and filed by the court in accordance with the verdict, and the Flood Control District's motion for a new trial having been denied, the latter prosecutes this appeal.

The lands of respondents Yonker consist of about 15½ acres, of which appellant Flood Control District sought to take approximately 3.06 acres. It appears that during the rainy season a considerable supply of sand and gravel was washed down by the normal flow of waters upon respondents Yonkers' property. Upon this land respondents Yonker had constructed bunkers on the northerly bank of the stream. Following each rainy season and after the bed had dried, respondents Yonker would scrape up the rock, sand, and gravel so deposited on their lands, sift it through their bunkers to take out the glass, tin cans and junk, and then sell it commercially as building material. The construction of this improvement sought to be installed by appellant Flood Control District in the form of a permanent concrete channel or flume, with a concrete floor approximately 40 feet wide, and with concrete walls on each side approximately 14 feet high, would, of course, prevent the water from flowing across respondents Yonkers' land, and consequently there would be no replenishment of rock, sand, and gravel to be utilized as above set forth after the construction of the proposed improvement.

Appellant Flood Control District first assails the judgment given in favor of respondents Yonker on the ground that it is based on the erroneous theory that a property owner has a vested present right to receive future accretion from the waters of a seasonal wash or arroyo, and is entitled to be compensated in a condemnation proceeding for the construction of a flood control channel upon his land which prevents the deposit of such future accretions of rock, sand, and gravel; and that the owner of lands, riparian to a seasonal wash or arroyo, has the right to claim a beneficial use or riparian right to have the waters of the stream deposit sand and rock upon his land for use by him in commercial sale; while respondents Yonker contend that appellant Flood Control District is neither an upper riparian owner nor appropriator of water, but a public body seeking to condemn a right of way for flood control purposes under the constitutional provision which requires that compensation be paid for taking or damaging of private property for public use; and respondents Yonker further contend that as riparian owners they had the right to receive the normal and natural flow of water in the Alhambra wash upon and through their lands; that the rights in the normal stream flow are "parcel" to the real estate. Respondents Yonker earnestly insist that there is no issue here involved as to their right to future annual deposits of rock, sand, and gravel, contending that at the time of the taking and damaging of their property they were receiving upon their lands certain deposits of rock, sand, and gravel held in suspension by the waters of the Alhambra wash; that no other riparian owner or appropriator of water, nor any one with rights superior to theirs was attempting to interfere with respondents' use of the stream flow of the Alhambra wash, nor had any one so attempted to interfere with the use of the normal and natural flow during some 30 years that the sand and gravel plant had been in operation. Respondents Yonker concede the right of appellant Flood Control District, in the exercise of eminent domain, to acquire for a public purpose the easement sought to be condemned by these proceedings, but assert that as a condition to the acquisition of such an easement said district must pay not only for the property taken, but also for damages to the remainder.

[1,2] We find ourselves in accord with the claims of respondents Yonker. That

they were riparian owners cannot be questioned. The word "riparian" is defined as relating to the bank of a stream or other water—river, lake or sea. Black's Law Dict.; Anderson's Law Dict. The Latin word "ripa" means "shore of a river." Anderson's Law Dict.; Bathgate v. Irvine, 126 Cal. 135, 143, 58 P. 442, 77 Am.St.Rep. 158. "The rights of a riparian proprietor, so far as they relate to any natural stream, exist jure naturae, because his land has by nature the advantage of being washed by the stream." Lord Seldon, in *Lyon v. Fishmongers Co.*, L.R. 1 A.C. 662.

[3,4] We are not here dealing with flood waters which, when of no benefit to a riparian owner or to his land and not used by him, may be taken at will by any person who can lawfully gain access to the stream, but are concerned with a natural flow of water, which, under the established doctrine of the California decisions, is annexed to the soil, not as an easement or appurtenance, but as a parcel. *Herminghaus v. Southern Cal. Edison Co.*, 200 Cal. 81, 252 P. 607.

[5-7] The beneficial use of the flow of the water in the Alhambra wash by respondents Yonker had become a property right vested in them by thirty years of usage. These respondents purchased land through which flowed this water, and constructed bunkers and equipment thereon with which they sifted sand and gravel which was washed upon the lands by the stream, and which commodity they sold commercially. There is nothing in the record here indicating that the channel or improvement as proposed to be constructed by the appellant Flood Control District was intended to prevent any damage by erosion of lands of other owners from whence came rock, sand, and gravel that was deposited on respondents Yonkers' land. In fact, it is conceded that the proposed improvement was primarily constructed to control flood waters and not to protect other riparian owners from erosion through the natural flow of water upon their land; and, as heretofore stated, the theory of respondents Yonker is that prior to the installation of the improvement proposed to be constructed by appellant Flood Control District, respondents Yonker were receiving upon their land deposits of rock, sand, and gravel held in suspension by the waters of the Alhambra wash; and it must also be remembered that over a period of some thirty years, during which the rock, sand, and

gravel were utilized for commercial purposes by the owners of the land here in question, no one alleging superior rights attempted in any way to interfere with the use to which respondents Yonker were putting their lands. This certainly was a beneficial use, and it was dependent for its success and consequent income upon the uninterrupted natural flow of the waters. That the water, to be put to a beneficial use, must be utilized for irrigation or domestic purposes alone, is not the law. In *City of Los Angeles v. Aitken*, 10 Cal.App. 2d 460, 52 P.2d 585, 587, the plaintiff city contended that it did not have to pay for the damage to the owners of property on the shore of Mono lake who had constructed pleasure resorts thereon which such owners operated for a profit; it being the contention of the city that such damage was not compensable in a condemnation proceeding. However, in accordance with the preceding principle announced by us, the court said:

"The attractions of the traveling public for Mono Lake include its unusual and picturesque location, the beauties of its surroundings and the pleasure of boating, bathing, and the hunting of wild ducks and geese which frequent the lake in large numbers during certain seasons. The evidence indicates that the respondents depend for their livelihood and the maintenance of their resorts chiefly on the incomes derived from their transient guests and customers. When the lake is destroyed, the surrounding country will be converted into a desert and their properties will become valueless. * *

"It is also true that the mere privilege of bathing, boating, and hunting on a navigable lake by the owner of marginal property thereon, is not such a beneficial use of the lake as will entitle one to compensatory damages for the destroying of those advantages. In the present case, however, the respondents are not complaining of their loss of the personal privileges of bathing, boating, or hunting on Mono Lake. They purchased land bordering on this unique lake and constructed buildings and improvements thereon for the maintenance of auto camps and pleasure resorts which are dependant for their success upon the income derived from the traveling public which is attracted to this alluring lake by these advantages. These enterprises depend on the continuation of these attractions. Without the existence of this lake and its surrounding attractions the value of the respondents' properties will be practically destroyed.

These privileges and attractions constitute important assets in determining the value of their properties. Moreover, *among the essential littoral rights which are possessed by the respondents is their lawful right to the unmolested access to the lake.*" (Italics added.)

In 67 Corpus Juris p. 852, § 279, it is said: "One who owns lands adjacent to a natural lake is entitled to have the waters therein preserved in their natural state. Thus a riparian owner is entitled to have the waters of the lake upon which his property abuts remain at their accustomed level without interference."

In the case of *Martha Lake Water Co. v. Nelson*, 152 Wash. 53, 277 P. 382, the Supreme Court of that state held that the water company could not appropriate the water of a non-navigable lake to be used on non-riparian land without first condemning the riparian rights of owners of land bordering thereon, and paying them just compensation for the detriment to their property as the result thereof. Further, in accord with the principle we have herein enunciated, it has been held that the owner of a mill which was situated on a stream near the outlet of a lake was entitled to relief against the city for greatly reducing the volume of water in the lake and for diminishing the stream, under authority of an act of the Legislature, so as to impair the efficiency of the mill, by pumping from the lake several million gallons of water daily and conveying it by means of an aqueduct a great distance to the city for municipal purposes. See *Black's Pomeroy on Water Rights*, p. 9.

In the comparatively recent case of *Litka v. City of Anacortes*, 167 Wash. 259, 9 P.2d 88, 89, it was held that the owner of property adjacent to non-navigable Lake Campbell, which had an area of 320 acres, who constructed a dwelling house, bath-houses, cabins, and a dock thereon, using the place as a resort, where he ran a small store, served meals, rented boats, and conducted a bathing beach and camp ground, *and which had no value for agricultural purposes*, was entitled to just compensation against the city of Anacortes for damage to his property resulting from its pumping nearly all of the water from the lake for municipal purposes, leaving an unsightly, barren mud flat in lieu thereof. Particularly appropriate to the litigation now before us is the language of the court in the last-cited authority, when it said: "When the city appropriated the

water from the lake, it took from the respondents the very thing that was necessary and essential to the use of their property, and a valuable property right."

So in a case at bar, when the appellant Flood Control District diverted the waters of Alhambra wash, it took from the respondents Yonker the very thing that was necessary and essential to the use of their property, and the record shows the highest and best use to which it could have been put and had been put for some thirty years. This was a valuable property right; and under our system of government an attempted invasion of the established doctrine of eminent domain in the guise of the exercise of police powers, so as to deprive individuals of their property rights without just compensation, finds no countenance. As was said in *City of Los Angeles v. Aitken*, supra, "In the interest of justice the property rights of individuals should be carefully guarded. Governments are intended primarily to protect the rights of their individual citizens. The equitable and well-established doctrine of eminent domain should not be invaded in the guise of the exercise of police powers so as to deprive individuals of their property rights without just compensation. Neither the Constitution nor the laws of California are intended for any such unjust purpose."

We therefore hold that the rights possessed by appellant Flood Control District as a public body give it no right to arbitrarily divert the natural flow of water from the lands of respondents Yonker for other uses and purposes, because, although the rights possessed by appellant Flood Control District be public in their nature, such rights can only be acquired under and by virtue of the sovereign right of eminent domain, and upon making just compensation.

[8] The use to which the water here in question was put by respondents Yonker in no way contravened the provisions of section 3, article 14, of the Constitution of this state. The trial court therefore was correct in instructing the jury that severance damages could be awarded to respondents Yonker.

[9,10] As to the amount of damages awarded to the respondents Yonker, there being in the record evidence of sufficient substantiality, if believed by the jury, to warrant an award in the amount given, this matter is governed by the familiar rule that appellate courts will not set aside a verdict for the award of which there is substantial

evidence in the record. The credibility of witnesses and the intrinsic weight and value of testimony are questions for the jury.

[11] As to appellant's claim that the evidence as to severance damages concerning defendants Yonker's property was wholly speculative and conjectural, it is sufficient to say that there is evidence in the record given by witnesses whose competency to testify was established, to the effect that in arriving at the amount of respondents Yonker's damages, they took into consideration the condition of the property, the use to which it had been put, the existing advantages for making a practical use of the property, and such advantages as might be reasonably expected in the immediate future. These are all matters for consideration in estimating the value of lands. *San Diego Land, etc., Co. v. Neale*, 88 Cal. 50, 25 P. 977, 11 L.R.A. 604.

[12-14] With reference to the verdict in favor of defendant Carroll, appellant also urges that the amount is excessive and unreasonable, and for that reason the judgment should be reversed. Witnesses for both sides at the trial practically conceded that defendant Carroll's property was rendered valueless by the improvement, and she herself testified that it had a value of \$4,000 which was totally destroyed by the improvement; while one of the expert witnesses testified that the property was worth within \$60 of the amount awarded by the jury. Owners are presumed to know the value of their property, and being permitted under the law to testify thereto, their evidence in that regard is entitled to be weighed and considered by the jury. It may be true that the finding of the jury upon the question of damages sustained by respondent Carroll operated unjustly against appellant Flood Control District, but it is equally true that the findings of juries as to damages in any case may at times be unjust; but until some better and safer method of estimating the compensation to be awarded to the owners of property in condemnation proceedings is devised, we must be content to abide by the verdict of an impartial jury, notwithstanding the possibility that injustice may sometimes be done. In any event, as to excessive damages, a new trial may not be granted because the verdict seems large, or because it is larger than the court, if sitting as a jury, would have given; but only where it appears that it was "given under the influence of passion or prejudice." Section 657, Code Civ.Proc. In oth-

er words, the "verdict will not be disturbed as excessive unless the damages awarded are so excessive as to indicate that the jury acted under such influence." 20 Cal.Jur. 101. There is nothing in the record indicating that the jury in the instant case was actuated by elements of passion or prejudice in believing and acting upon testimony which was admissible and competent, and which, if believed, justified a finding in favor of respondent for the amount of damages awarded by the verdict.

[15] Appellant next complains that the court by its instructions misdirected the jury, and in particular assails an instruction which in part contains the following language: "However, in fixing the amount of damages sustained by said defendant, by way of severance, as of said date, you are further instructed that said damages, if any are *tortious in nature*, and the measure of such damages consists of the amount which will compensate said defendant for all the detriment proximately caused thereby, whether it could have been anticipated or not. It was proper for said defendant to prove that the highest and best use of the land condemned was for the production of sand and gravel, or that it was peculiarly adapted for that use, and what it was capable of producing, both as to quality and quantity. To that end, it was proper for said defendant to show what the land had ordinarily produced within a reasonable time in the past as bearing upon what it might reasonably be expected to have produced when destroyed or condemned. In other words, the damages which, in the ordinary course of things, would be likely to result from a *tortious injury to property* must be taken as the basis of the compensation to which the defendant would be entitled."

At first blush, this and some other instructions complained of, the narration of which would unduly prolong this opinion, might seem to be fatally defective. But a reading of all the instructions given by the trial court, and a consideration of them as a whole, indicates that the jury was fully, correctly, and fairly instructed that in determining the value of the parcels sought to be taken, "you must use, as a basis for your calculation and determination, the market value of the property as of March 10, 1936"; while another instruction stated that the jury had two questions for determination; first, the market value of the property as of March 10, 1936, and, second,

the damages accruing by reason of the severance and the construction of the improvement. In another instruction we find a correct definition of market value, which, when taken together with still another instruction, properly advised the jury that the measure of damages was the market value of the property as defined by the court. The record contains instructions to the jury stating that they must exclude uses and purposes which are remote and speculative and must not take into consideration the value as a plan, or consider the earnings from the collection and sale of rock and gravel. As to market value, the court advised the jury that the same is to be determined in view of all the facts which would naturally affect its value in the minds of purchasers generally, and that any existing facts which entered into the value of the land in public and general estimation, and tending to determine in this connection, should be considered. The jury was further admonished that they could not take into consideration speculative uses or purposes, or any special plans for future improvement or for the future use of said property. The court also cautioned the jury in its instructions that in determining the damages by reason of the severance and the construction of the improvement, they must measure the damages by determining the depreciation in the market value of the property remaining.

[16, 17] It is not proper for a reviewing court to take one isolated instruction and consider it alone, separate and apart from the other instructions given. *Burr v. Floyd*, 137 Cal.App. 692, 698, 31 P.2d 402. Instructions must be considered in their entirety, and if, when so considered, they state the law of the case fairly and clearly, then they are, as a whole, unobjectionable, even though some isolated passages from a single instruction are amenable to criticism. *Hamilton v. Hammond Lumber Co.*, 13 Cal.App. 2d 461, 463, 56 P.2d 1257; *Douglas v. Southern Pacific Co.*, 203 Cal. 390, 264 P. 237. Reading all of the instructions, we are satisfied that the jury properly understood, and, in legal theory, at least, adopted the rules properly applicable to the determination of an action in eminent domain, and that the idea conveyed in the several correct instructions must have preponderated in the considerations of the jury, as a consequence of which the instructions complained of as being erroneous neither contributed to nor controlled the verdict. *Saltzen v. Associated Oil Co.*, 198 Cal. 157, 244 P. 338.

Finally, appellant urges a reversal upon the ground of alleged misconduct on the part of one of the jurors. On the hearing of the motion for a new trial, an affidavit was presented wherein the city engineer of Alhambra deposed that during the progress of the trial one of the jurors trying the cause inquired of him concerning the nature, character, quality, price, and value of rock, sand, and gravel for building purposes from the deposits and plants in San Gabriel wash to the east of Alhambra, and that affiant city engineer answered the juror's questions to the best of his opinion and judgment as to quality, price and value, and "discussed the matter generally with her." This affiant further stated in his affidavit that the juror in question asked him particularly with reference to such materials taken from Alhambra wash in or in the vicinity of the cities of Alhambra and San Gabriel, which questions affiant further stated he answered to the best of his opinion and judgment. These were matters concerning which witnesses testified during the trial to different prices and values thereof, and upon which the court predicated an instruction concerning the measure of compensation to be awarded and on determining the fair market value of the land taken with the sand, rock, and gravel in it. Because of this action upon the part of one of the trial jurors, appellant earnestly insists that the judgment herein should be reversed.

[18] So far as respondent Carroll is concerned, this claim is without merit, because the evidence received by this juror from an outside source did not concern any question in connection with the Carroll land which had been made material to the principal issues submitted to the jury for their determination as a question of fact upon which to base their verdict. Respondent Carroll did not claim to be a riparian owner or that she was receiving any rock, sand, or gravel by reason of the natural flow of any waters from Alhambra wash through her land.

[19, 20] With reference to respondents Yonker, it nowhere appears in the affidavit that the juror in question communicated to her fellow jurors, either within or out of the jury room, the information obtained as aforesaid; and in fact the contrary is made to appear, from all of which it necessarily follows that the information obtained by this juror could have had no effect whatever upon the verdict of the jury. Further, it has been said that in order to warrant

setting aside a verdict for misconduct, it must appear that prejudice resulted therefrom. *Saltzman v. Sunset Tel., etc., Co.*, 125 Cal. 501, 58 P. 169. Reference by us to the transcript in this case indicates that the jury was polled after the rendition of the verdict, and that ten jurors declared the verdict as rendered to be theirs, while two stated to the contrary. Of the two who voted against the verdict in favor of respondents Yonker, one was the juror against whom misconduct is charged. While the record does not indicate that the juror in question favored appellant Flood Control District, it does indicate that she was opposed to the verdict in favor of respondents Yonker. In the face of this state of the record, surely it cannot be claimed that her misconduct materially affected the substantial rights of the appellant, but on the contrary, however reprehensible was the conduct of the juror, it tended to aid rather than to militate against the appellant. The trial court was therefore correct in denying the motion for a new trial on the last-named ground.

No other points raised require discussion.

From the foregoing, it follows that the judgment from which this appeal is taken should be, and it is, affirmed.

I concur: YORK, P. J.

DORAN, Justice (dissenting).

I dissent as to that portion of the prevailing opinion affirming the judgment in favor of respondents Jacob H. Yonker and Kathryn L. Yonker. It so happens that these respondents have been for some time the beneficiaries of what, in geology, is known as "erosion." To most landowners this process is detrimental. The appellant Flood Control District, by interrupting and preventing the process of erosion above respondents' land and upon land not owned or controlled by respondents, has destroyed a sand and gravel pit on respondents' land. In other words, the continued existence of respondents' sand and gravel pit depends upon the destruction, by erosion, in some degree of the land above, as a result of which respondents' sand and gravel pit is replenished thereby from time to time during the rainy season.

Respondents Yonker are not entitled to severance damages for the following reasons: First, in my opinion, the law with respect to riparian rights has no application to the questions involved. The continued

benefit of erosion under such circumstances creates no vested right, for in no sense is such a benefit a part of what is recognized, under the law, as "riparian rights." Second, the Constitution provides that private property shall not be taken or damaged for public use without just compensation. Const. Art. 1, § 14. However, the process of erosion is not private property, and such process therefore is no part of respondents' property. To award damages on such a basis would, in effect, compensate respondents for something which they did not own. Respondents can claim no title, as part of their "private property," to sand and gravel which may or may not be deposited thereon, according to the weather. The loss of such a benefit as claimed by respondents is not compensable in damages, in my opinion, and the authorities relied upon by appellant, to my mind, support appellant's contention in this regard.



25 Cal.App.2d 49

PEOPLE v. HENRY.

Cr. 359.

District Court of Appeal, Fourth District,
California.

Feb. 10, 1938.

1. Assault and battery ☞92

Under information charging assault with a knife, evidence, consisting of testimony that accused wore a ring, that victim was cut on chest through sweater, on chin, and on neck, and that cut on neck was long and deep, medical testimony that cuts were clean and had been made by sharp instrument, and exhibition of victim's scars, sufficiently established that accused used a knife to support conviction notwithstanding absence of direct testimony that accused used a knife, where scars were not described in record.

2. Criminal law ☞1144(13)

On appeal from conviction of assault with a deadly weapon, as respects accused's contention that the people failed to show he used a knife, as charged in information, where victim's scars, which were exhibited to jury, were not described in record,

reviewing court would assume that nature of scars supported jury's conclusion that they had been made with a knife.

—♦—

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Alfred Henry was convicted of assault with a deadly weapon, and he appeals.

Affirmed.

A. L. Wissburg, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen. and John O. Palestine, Deputy Atty. Gen., for the People.

MARKS, Justice.

This is an appeal from a judgment and from an order denying defendant's motion for new trial after conviction of the crime of assault with a deadly weapon. Defendant was sentenced to confinement in the county jail of Riverside county for a period of sixty days.

Defendant urges that the evidence does not support the verdict and judgment and complains of instructions given at the request of the district attorney.

[1] The information charges that the assault was committed with a knife. No one saw any knife used and defendant denied having had one, or any other weapon during his altercation with S. L. McCoy, the complaining witness. He had a ring on a finger of the hand with which he struck McCoy and argues that the wounds were either caused by this ring or by his fingernails.

McCoy had three wounds on his person which had been inflicted by defendant. One was a cut on his chest. The sweater worn by McCoy was cut over the place of this wound. There was another cut on McCoy's chin and a third on his neck. This last cut went rather deep into the neck muscles and was quite long. The physician who dressed the wounds testified that the cuts were clean and had been made by some sharp-edged instrument such as a knife or a razor.

[2] McCoy exhibited the scars of his wounds to the jury. The appearance of these scars was evidence of considerable importance. If the edges appeared smooth, this fact would justify the inference that the wounds had been made with a sharp instrument such as a knife. The scars are not described in the record. We must,

therefore, assume, in support of the judgment, that their nature supported the conclusion of the jury that they had been made with a knife.

We have studied the instructions and find nothing so prejudicially erroneous in any of them as to justify a reversal of the judgment.

The judgment, and the order denying the motion for new trial, are affirmed.

I concur: BARNARD, P. J.



24 Cal.App.2d 551

STORRS et al. v. BELMONT GOLD MINING & MILLING CO. et al.

Civ. 2118.

District Court of Appeal, Fourth District, California.

Jan. 26, 1938.

Hearing Denied by Supreme Court
March 25, 1938.

1. Corporations ⇨289

Four corporation directors, elected during suspension of corporation's right to do business for nonpayment of franchise tax, were de facto directors, constituting, with three de jure directors, de facto board empowered to act for corporation after revivor of such right. St.1931, p. 2228, § 32.

2. Landlord and tenant ⇨61

A tenant cannot contest his landlord's title.

3. Mines and minerals ⇨107

A mining lease and extensions thereof, executed by corporate lessor during suspension of its right to do business for nonpayment of franchise tax, were not void. St. 1931, p. 2228, § 32.

4. Quieting title ⇨17

Persons claiming mineral locations and mill site location through lessee thereof, from whom they took with notice of defects in his title and lessor's claim of title, had no rights superior to those of lessee before his conveyance thereof to them, so that lessor's title thereto was properly quieted as against them.

5. Mines and minerals ⇨19(1)

The description of mining claim in location notice must be sufficient to convey

to prospector information that particular tract has been claimed by locator. Civ.Code, § 1426.

6. Mines and minerals ⇨19(1)

Descriptions of mining claims in location notices as "commencing at this monument," running stated distances in each direction and joining other named claims on designated sides and ends, were insufficient as not locating monuments, so that locator gained no rights thereunder and conveyed nothing by deed of such claims, regardless of her good faith in making locations. Civ. Code, § 1426.

7. Quieting title ⇨43

Evidence of expenditures on mine by one contracting with corporate owner of mining claim to do assessment work in exchange for stock in corporation and subsequently leasing claim to him was inadmissible in his assignee's action to quiet title thereto as against corporation, where pleadings made no issue as to plaintiffs' right to recover amount of such expenditures.

8. Mines and minerals ⇨109

The assignees of one contracting with corporate owner of mining claims to do assessment work in exchange for stock and given right by corporation's subsequent lease of claims to him to take his compensation out of ore mined by him could not recover compensation from corporation.

Appeal from Superior Court, San Bernardino County; Frank A. Leonard, Judge.

Action by R. A. Storrs and another against the Belmont Gold Mining & Milling Company, Roger J. O' Reilley, and others to quiet title to certain mining claims and a mill site claim, in which defendant mining company filed a cross-complaint to quiet title thereto. From a judgment quieting cross-complainant's title, except as against defendant O'Reilley's mortgage interest and the United States, plaintiffs appeal.

Affirmed.

H. C. Millsap, of Los Angeles for appellants.

Halverson & Halverson, of Los Angeles, for respondents.

MARKS, Justice.

This is an appeal from a judgment in favor of Belmont Gold Mining and Milling Company (hereinafter called the mining

company), quieting title in and to eighteen lode mining claims, and one mill site claim, except against the mortgage interest of defendant Roger J. O'Reilly, and the paramount title of the United States.

Plaintiff commenced this action to quiet title to the claims. The mining company denied plaintiffs' title, asserted title in itself, and filed a cross-complaint to quiet title against plaintiffs. O'Reilly denied plaintiffs' title and asserted the lien of his mortgage. The case was submitted on an agreed statement of facts supplemented by brief testimony of witnesses.

The mining company is a California corporation. About May 1, 1931, its corporate powers were suspended because of failure to pay its franchise tax. Stats. 1929, pp. 19, 33, § 32. It was reinstated on petition of L. V. Storrs, who paid the delinquent taxes. The certificate of revivor was dated September 29, 1933.

The stipulated facts pertinent to this appeal may be summarized as follows: That the mining company was legally entitled to possession of the property involved and was its owner, subject to the rights of the United States, "up to and including July 1, 1930"; that on July 15, 1930, the mining company made a contract with L. V. Storrs to do the assessment work on the property for the year ending July 1, 1931; that for this work Storrs was to receive 90,000 shares of the capital stock of the mining company; that proof of labor performed by Storrs was recorded by C. S. Price, a stockholder, on September 12, 1931; that on September 21, 1931, the Commissioner of Corporations issued a permit under which the mining company issued 90,000 shares of its capital stock to L. V. Storrs and his nominees; that the stock was issued to Storrs and his nominees and placed in escrow for them; that on April 16, 1932, after the stock had been issued and placed in escrow the Commissioner of Corporations suspended the permit because of the suspension of the mining company's right to do business; "that on August 17, 1931, the corporation and L. V. Storrs entered into a purported contract of lease under which the corporation was lessor and L. V. Storrs was lessee which purported contract is attached hereto marked exhibit IV and made a part hereof; that pursuant to the terms of said purported contract L. V. Storrs performed the assessment work required by law for the assessment year July 1, 1931, to July 1, 1932, upon all of the min-

ing claims in controversy herein"; that this lease gave Storrs the right of possession of the property and required him to mine ore therefrom; that on July 6, 1932, this lease was extended for one year from August 17, 1932, with one change in its terms not important here; that on June 21, 1933, it was again extended for six months from August 17, 1933, with provisions for a further extension; that on June 30, 1932, an Act of Congress, 47 Stat. 474, 30 U.S.C.A. § 28a note, suspended for one year the necessity of doing assessment work on mining claims; that a second Act of Congress, May 18, 1933, 48 Stat. 72, 30 U.S.C.A. § 28a note, suspended the necessity for assessment work under certain conditions between July 1, 1932, and July 1, 1933; that other acts of Congress were subsequently passed suspending the necessity for assessment work under certain conditions during all times material to this appeal; that various stockholders of the mining company recorded affidavits attempting to take advantage of these acts of Congress; that on March 14, 1932, at a purported stockholders' meeting, four new directors, including L. V. Storrs, were elected to take the places of four directors who retired; that at a purported directors' meeting held on the same day L. V. Storrs was elected president of the mining company; that on October 3, 1933, after the revivor of the mining company a meeting of the new purported board of directors was called and held in which L. V. Storrs participated; that at this meeting a resolution was passed ratifying all acts, transactions, and contracts of the mining company during its period of suspension and particularly the contracts with Storrs; that on January 23, 1934, a stockholders' meeting was held at which L. V. Storrs and others were elected directors, and thereafter on the same day a directors' meeting was held in which L. V. Storrs participated; that on January 31, 1934, L. V. Storrs posted notices of location on the mining claims and claimed the property as his; that on May 14, 1934, L. V. Storrs deeded one-third of his interest in the mining property to plaintiff H. H. King and two-thirds to plaintiff R. A. Storrs; that plaintiffs took with notice of the claims of the mining company to the property; that on May 14, 1934, plaintiffs took possession of the mining property and thereafter excluded the mining company therefrom; that on September 30, 1934, "plaintiffs voluntarily relinquished possession of seven of said

mining claims hereinafter more particularly described, and on the same day notices in the name of Marie Bronson, a citizen of the United States, were posted on each of said seven claims and on October 6, 1934, were filed in the office of the county recorder of San Bernardino county, and on November 22, 1934, the said Marie Bronson executed and delivered to the plaintiffs the deed attached hereto marked exhibit XX and made a part hereof, and on November 22, 1934, the said plaintiffs went back into possession of said seven claims"; that Marie Bronson had notice of the claims of the mining company to the property; that the mining company demanded possession of and attempted to enter upon the claims, but were excluded by plaintiffs.

The stipulation contains two other provisions which require quotation. They are as follows:

"That all the facts herein stipulated to as happening subsequent to the filing of the complaint herein shall be deemed to have been alleged as herein set forth in said complaint. * * *

"The validity of all the acts of the corporation, its directors or officers or anyone acting in its behalf as hereinbefore set forth is admitted except in so far as those acts may be affected by the suspension of the corporation rights, powers, and privileges as mentioned in Paragraph I hereof."

[1] It is clear that plaintiffs' sole ground for a reversal of the judgment is under the provisions of section 32 of the Bank and Corporation Franchise Tax Act, Stats.1929, pp. 19, 33; Stats.1931, p. 2228, which, with exceptions not applicable here, suspended the right of a domestic corporation to do business if it failed to pay its corporation franchise tax. They maintain that all the acts of the mining company and everything done in its behalf during the period of suspension were void. They further maintain that all acts of its board of directors after its revivor were void because four of the seven directors who participated in those meetings were elected during the suspension period and were, therefore, neither qualified nor elected; that the three remaining qualified directors could not hold a lawful directors' meeting as they did not constitute a quorum.

For the purposes of this opinion we may concede that the four directors elected during the suspension period were not the de

jure directors of the corporation. They were, however, its de facto directors and with the three de jure directors constituted a de facto board that could act for the corporation after the revivor. *Jones v. Peck*, 63 Cal.App. 397, 218 P. 1030.

[2, 3] Plaintiffs contend that as the lease and extensions were executed during the period of suspension they were void. They thus attempt to escape the results of a firmly established rule that a tenant cannot contest the title of his landlord. This contention has been decided adversely to plaintiffs in the case of *Depner v. Joseph Zukin Blouses*, 13 Cal.App.2d 124, 56 P.2d 574, 575, where it is said:

"Appellants contend that the judgment should be reversed for two principal reasons: First, because the second modification of the lease is void, having been executed after the powers of the corporation had been suspended; and, secondly, because applying the \$20,000 which has been deposited as security for the faithful performance of the lease by the lessees was void because it was a forfeiture, as provided by section 1670 of the Civil Code.

"Prior to 1929 every contract entered into by a corporation after its suspension for failure to pay its franchise tax was declared to be void.

"In 1929 the bank and corporation franchise tax act was enacted, and by section 32 of that act it is provided that failure to pay the said tax suspended the powers, rights, and privileges of the corporation so failing, but also provided that every contract made in violation of this section should be voidable (Stats. 1929, pp. 19, 33). In 1931 this same provision making contracts voidable under said section 32 was continued in force by the amendment of said section 32 (Statutes of 1931, page 2228).

"A voidable act takes its full and proper legal effect unless and until it is disputed and set aside by some tribunal entitled so to do. 3 Bouv.Law Dict. 3406. 'Voidable' means subject to be avoided by judicial action of a court, of adequate jurisdiction. 8 Words and Phrases, First Series, 7342. And a voidable contract is one which is void as to the wrongdoer but not void as to the wronged party unless he elect to so treat it. *Inlow v. Christy*, 187 Pa. 186, 40 A. 823. A voidable contract is one which may be rendered null at the option of one

of the parties, but is not void until so rendered. *Meridian Life Ins. Co. v. Dean*, 182 Ala. 127, 62 So. 90.

"Inasmuch as the wronged party in the instant case has not by a judicial adjudication or otherwise declared the agreement of March 22, 1932, void, we are of the opinion that the said agreement remains in full legal force and effect."

[4] As plaintiffs claim twelve mineral locations and the mill site location through L. V. Storrs, and as they took with notice of the defects in their grantor's title as well as the mining company's claim of title, they have no right superior to those L. V. Storrs would have had had he not conveyed to them. As Storrs could not dispute his lessor's title, it follows that the judgment as to these thirteen claims must be affirmed.

There remains for consideration the validity of the attempted location of the seven claims by Marie Bronson, who, it must be remembered, also had notice of the claims of the mining company to all of the locations.

[5] Section 1426 of the Civil Code provides, in part, as follows:

"Any person, a citizen of the United States, or who has declared his intention to become such, who discovers a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposit, may locate a claim upon such vein or lode, by defining the boundaries of the claim, in the manner hereinafter described, and by posting a notice of such location, at the point of discovery, which notice must contain: * * *

"Fifth. Such a description of the claim by reference to some natural object, or permanent monument, as will identify the claim located."

It seems to be settled in California that the description in a location notice must be sufficient to convey to a prospector the information that a particular tract of ground has been claimed by the locator. *Mutchmor v. McCarty*, 149 Cal. 603, 87 P. 85; *McLean v. Ladewig*, 2 Cal.App.2d 21, 37 P.2d 502.

[6] The descriptions in the seven location notices of Marie Bronson are similar in legal effect so the quotation from one of them is sufficient. It is as follows: "Commencing at this monument and running 750 ft. Easterly, 750 ft. Westerly, 300 ft. North-

erly, and 300 ft. Southerly, This Claim joins the Marie #1 claim on the South side, the Marie #3 on the North side, the Marie #4 on the East end, and the Marie #5 on the West end."

The descriptions of all her claims are equally indefinite. No attempt is made to locate the monument. The claims might be anywhere in the Goldstone mining district of San Bernardino county. As the location notices do not conform to the requirements of our law, Marie Bronson gained no rights under them. It follows that she had nothing to convey to plaintiffs. This conclusion renders it unnecessary to inquire into her good faith in making the locations.

[7, 8] Plaintiffs complain of the judgment quieting the mining company's title against them without taking into consideration the money L. V. Storrs had expended on the mine. Evidence of these expenditures, if any evidence there be, was admitted over the objections of defendants which should have been sustained as no issue involving this question was made in the pleadings. This claim for compensation from the mining company is based upon the contract with Storrs to do the assessment work in exchange for 90,000 shares of the stock of the mining company and upon the lease between Storrs and the mining company and its extensions. The first contract fixed the only consideration flowing to Storrs as the 90,000 shares of stock. If that consideration has failed there may be some ground of complaint. Still, plaintiffs, as assignees of Storrs, cannot expect to recover without some appropriate pleading. The lease and its extensions gave Storrs, as his sole reward, the right to take his compensation out of the ore mined by him. Storrs sold the ore which he mined and kept the proceeds which gave him all the compensation to which he was entitled under his written contract. No obligation was created on the part of the mining company to pay Storrs anything for work done by him under the lease. It follows that neither Storrs nor his assignees can recover anything from the mining company.

On the record before us no right of recovery is shown on the part of Storrs or his assignees, the plaintiffs.

The judgment is affirmed.

I concur: BARNARD, P. J.

**AMERICAN TRUST CO. v. CALIFORNIA-
WESTERN STATES LIFE INS. CO.***
Civ. 10431.

District Court of Appeal, First District,
Division 2, California.

Feb. 1, 1938.

As Modified on Denial of Rehearing
March 3, 1938.

Hearing Granted by Supreme Court
March 31, 1938.

1. Statutes $\Rightarrow$ 196

Rule in statutory construction that syntax and rules of grammar contemplate that qualifying words and phrases ordinarily refer to the next preceding antecedent may be overthrown by a very slight indication of legislative purpose or parity of reason or the natural and common-sense reasoning of the statutes, so as to give the statute a more comprehensive application than that available under such rule.

2. Statutes $\Rightarrow$ 190

The rules of interpretation do not apply if the statute is free from ambiguity.

3. Statutes $\Rightarrow$ 190

The rule of statutory construction that qualifying words ordinarily refer to the next preceding antecedent did not apply to statute relating to liability of shareholders selling to corporation shares issued by the corporation, since statute was not ambiguous. Civ.Code, § 365.

4. Statutes $\Rightarrow$ 195

The provision of the statute relating to liability of shareholders selling shares issued by the corporation to the corporation in violation of statute is exclusive, and the maxim *expressio unius est exclusio alterius* is applicable. Civ.Code, § 365.

5. Action $\Rightarrow$ 35

If a person contends that more than one remedy exists for the same cause of action under revisory statute, he must quote those provisions from the face of the statute showing the existence of cumulative remedies.

6. Corporations $\Rightarrow$ 376

Provision with respect to liability of shareholders selling to corporation in violation of the statute, shares issued by that corporation, which forms part of statute governing corporations, which expressly repeals provisions in superseded statutes not contained in superseding statute, in so far

as such provision changes the remedy afforded corporation, controls over previous statute. St.1931, p. 1763, § 1; Civ.Code, § 365.

7. Corporations $\Rightarrow$ 376

The maximum liability of shareholder which had sold stock to corporation issuing such stock but which had not subscribed for any stock would be amount of payments received, under statute relating to liability of shareholders selling to corporation, in violation of the statute, shares issued by that corporation. Civ.Code, § 365.

8. Statutes $\Rightarrow$ 216

The court, in construing a statute, would not consider comments on statutes by author thereof or by legislative counsel in absence of showing that either class of statements came within rule permitting court to examine reports, published by authority of law, of legislative body.

9. Corporations $\Rightarrow$ 376

The rule requiring return of stock to seller by corporation desiring to repudiate contract by which corporation agrees to buy stock issued by it is a rule imposed by court so that the aggrieved party should do equity.

10. Corporations $\Rightarrow$ 376

That amount of recovery by a corporation seeking to recover payments made under agreement to buy its own stock may be less under amendment than under prior statute would not constitute an excuse for a failure on part of the corporation to do equity. Civ.Code, § 365.

11. Corporations $\Rightarrow$ 376

The rule requiring equity to be done when a corporation seeks to recover payments made under contract to buy its own stock, under which corporation might be required to return stock to the seller, does not add to nor detract from statute relating to seller's liability in buying stock in violation of the statute. Civ.Code, § 365.

12. Statutes $\Rightarrow$ 220

If statute relating to liability of shareholders selling to corporation stock issued by that corporation is ambiguous, the amendment thereof could be examined to ascertain intention of the Legislature in enacting the original statute. Civ.Code, § 365, as amended by St.1933, p. 1398.

13. Corporations $\Rightarrow$ 376

The statute enacted in 1931 relating to liability of shareholders selling to corporation shares issued by that corporation, con-

strued with amendment thereto, if ambiguous, limits the rights of corporation to recover from shareholders to the extent provided by the 1931 statute. Civ.Code, § 365, as amended by St.1933, p. 1398.

14. Corporations ⇨217

Provisions of statute governing corporations with respect to "stated capital," the purchase of its own stock by the corporation and those relating to remedies, where the corporation buys stock issued by it and where shareholders knowingly receive a dividend not authorized by statute, are intended to have the stated capital maintained to protect creditors. Civ.Code, §§ 300b, 342, 342a, 346-348, 363-365.

15. Corporations ⇨376

A shareholder which had sold stock of corporation to corporation issuing it was not liable to corporation for repayment of moneys received, in absence of showing that at time of the transaction the corporation had any liabilities or, if so, the amount thereof, or any showing that the shareholder was a subscriber for stock of corporation. Civ.Code, § 365.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by the American Trust Company against the California-Western States Life Insurance Company, for a declaratory judgment with respect to the right of the defendant to repayment of moneys which the defendant had paid to the plaintiff for shares of the stock issued by the defendant. Judgment for the defendant, and plaintiff appeals.

Reversed.

Brobeck, Phleger & Harrison, of San Francisco, and Henry W. Ballantine, of Berkeley, for appellant.

Williamson & Wallace, of San Francisco, and Ware & Ware, of Chico, for respondent.

STURTEVANT, Justice.

The plaintiff brought an action praying for declaratory relief. It stated the facts in detail. The defendant answered setting up additional facts. After a hearing before the trial court sitting without a jury, the latter made findings in favor of the defendant and from the judgment entered thereon the plaintiff has appealed.

In 1930, California State Life Insurance Company, hereinafter called "California," having its home office at Sacramento, Cal., desired to acquire the capital stock and assets of Western States Life Insurance Company, hereinafter called "Western," the latter's home office being located at San Francisco, California; to that end it began negotiations with Tucker, Hunter Dulin & Co., investment brokers of San Francisco, California was represented in the negotiations by its president, Mr. J. R. Kruse; Tucker, Hunter Dulin & Co. was represented by its then president, Mr. Nion R. Tucker, who thereafter also represented two corporate stockholders of Western, with which he was identified, i. e., Pacific American Company, Limited, hereinafter called "Pacific," and American National Company, hereinafter called "American," and Phyllis de Young Tucker, who was and is his wife.

As a result of the preliminary negotiations between Mr. Kruse, representing California, and Mr. Tucker, representing Tucker, Hunter Dulin & Co., an agreement was made between California and Tucker, Hunter Dulin & Co. whereby the former agreed to pay the latter a commission for securing for it not less than two-thirds (66,667 shares) of the outstanding stock of Western, then comprising 100,000 shares, and being all of the same class. During all of the times mentioned, more than 44 per cent. of Western's outstanding stock was owned and held by four stockholders who collectively owned 44,345 shares, as follows: Arthur D. King, 15,760 shares; American National Company, 14,301 shares; Pacific American Co., Ltd., 10,051 shares; Phyllis de Young Tucker, 4,233 shares; total, 44,345 shares. The plan of sale and purchase further contemplated that California would acquire as many more shares as could be so acquired and would thereafter take over the properties, including the insurance and going business, and thereupon would liquidate Western and take over its capital, surplus, and reserves.

The parties arrived at a final understanding on June 8, 1931, but did not, until later, execute the various instruments necessary to give effect thereto. Each of said four stockholders agreed to execute with California, in addition to the agreement that would result from their acceptance of the offer to be made by California to Western's stockholders generally, four several agreements, by which said four stockhold-

ers, respectively, agreed to sell and California agreed to purchase, within two years, at a price of \$60 per share, that is, \$30 for each one-half share, plus interest at 6 per cent. per annum, but less any dividends on said shares received by said stockholder in the meantime, the California shares which would be received by them in accordance with California's general offer of June 8, 1931. The agreements last mentioned were in the form of letters from California addressed to said four Western stockholders severally. Each of said letters contained a form for the approval thereof to be signed by the stockholder to whom it was addressed and delivered. The agreement of June 10, 1931, delivered by California to the plaintiff's assignor, is hereinbelow set forth.

Similar letters were delivered to the three other principal shareholders of Western; the variations therein being only with respect to the names of the addressees and the number of California shares, subject to the letter.

The letters so addressed and delivered to the four principal western stockholders, affected all the 22,172½ shares of California stock which said four stockholders would receive from California in consummation of the latter's general offer of June 8, 1931, save one-half share which was issued to Phyllis de Young Tucker, and has been owned and held by her since she acquired it, and was not subject to the June 10th agreement.

The signing of the various agreements to give effect to the plan occurred on June 10, 1931, at a meeting at the office of Tucker, Hunter Dulin & Co. in San Francisco, attended by the several parties and their counsel. At that time the agreement between California and Tucker, Hunter Dulin & Co., which was in letter form, was signed. It was in part as follows: "We offer that if, on or before October 1, 1931, certificates representing at least 66,667 shares of the present outstanding capital stock of Western States Life Insurance Company are deposited with American Trust Company at its principal office in San Francisco, California, properly endorsed for transfer to us, for the consideration hereinafter mentioned, we will, on or before October 1, 1931, pay to American Trust Company for the account of each of the depositing stockholders respectively, the sum of \$40 per share for each share represented by the certificates so deposited

by such stockholders (together with interest upon each such sum of \$40 at the rate of 6 per cent. per annum from the date of the deposit of such certificates but not prior to July 1, 1931, to the date of purchase by the undersigned), and deliver to American Trust Company for the account of such stockholder a certificate of stock in the undersigned made out to such stockholder; the number of shares of stock in the undersigned represented by such certificate to be ½ of the number of shares represented by the certificates deposited by such stockholder." At the same time, Mr. Kruse signed and delivered to the four large Western stockholders the letters containing California's agreement to take up the stock which would be issued to them under California's general offer. It is, omitting heading, as follows:

"In the event that you sell to us all of your stockholdings in Western States Life Insurance Company in accordance with the offer made by us to stockholders as contemplated by that certain agreement in letter form bearing date June 8, 1931, between us and Tucker, Hunter Dulin & Co., you are to cause to be resold to us or to some person designated by us, and we agree to repurchase or cause to be purchased by some person designated by us, on or before two years from the date hereof, 2116 shares of the stock of the undersigned given in part payment thereof, at the rate of \$60 per share, plus 6 per cent of such total amount, from the date of the consummation of such sale, in accordance with said offer, until the date of repurchase, less however, any and all dividends declared upon said repurchased shares.

"We furthermore undertake that in the event of such purchase by us of any stock of the Western States Life Insurance Company, in accordance with said offer, the undersigned will not increase the number of its outstanding shares of stock nor make any change in regard thereto, except as contemplated by said contract with the said Tucker, Hunter Dulin & Co. until after the repurchase of said shares in accordance with the first paragraph hereof.

"If the foregoing is in accordance with your understanding, kindly signify your approval thereof upon the copy of this letter enclosed herewith, and return the same to us.

"California State Life Insurance Company

"By J. R. Kruse, Pres.

"Approved:—"

These are the June 10, 1931, letters which lie at the basis of this case and its two companion cases. *California-Western States Life Ins. Co. v. Pacific American Co.*, 76 P.2d 208; *California-Western States Life Ins. Co. v. Tucker*, 76 P.2d 209. The record further discloses that each of the four largest stockholders was a large dealer in shares of corporate stock, that the business of each was conducted by a capable and competent manager, and that in selling his or its stock in the Western each acted upon the advice of able counsel.

By certain assignments this plaintiff acquired the rights of American National Company prior to the commencement of this action. On May 31, 1933, the date was approaching when, pursuant to the terms of the contract dated June 10, 1931, the defendant would have been obligated to repurchase the stock held by this plaintiff. Negotiations resulted in a modified agreement. In substance, that agreement was as follows:

(1) American Trust Company sold to California-Western States Life Insurance Company and the latter purchased from the former the 7150 shares of stock of California-Western States Life Insurance Company; (2) California-Western States Life Insurance Company agreed to pay to American Trust Company the purchase price of the stock, computed at the rate of \$60 per share—\$429,000—together with interest thereon, in the following manner: (a) In cash, concurrently with the execution of the agreement, one-half of the purchase price, amounting to \$214,500, together with the sum of \$15,084.27, representing the amount by which the accrued interest on the purchase price to June 10, 1933, exceeded the dividends theretofore declared on the stock, making a total sum of \$229,584.27; (b) by a promissory note for one-quarter of the purchase price, \$107,250, maturing on March 1, 1934; the note to be executed and delivered by the buyer to the seller concurrently with the execution of said agreement, bearing interest at the rate of 6 per cent per annum until paid; (c) by a promissory note for one-quarter of the purchase price, equaling \$107,250, maturing on January 1, 1935; the note to be executed and delivered by the buyer to the seller concurrently with the execution of the agreement, bearing interest at the rate of 6 per cent. per annum until paid; (3) as security for the payment of the two promissory notes, the buyer, con-

currently with the execution of the agreement, pledged to the seller 3,575 shares of stock of the buyer, being one-half of the 7,150 shares sold to the buyer; upon payment of the promissory note maturing on or before March 1, 1934, the seller agreed to release from the pledge and deliver to the buyer certificates for one-half of said pledged stock; and upon payment of the promissory note maturing on or before January 1, 1935, the seller agreed to release from the pledge and deliver to the buyer certificates for the remaining one-half of the pledged stock. Thereupon the stock was transferred to the defendant, the notes and the pledge agreement were delivered to the plaintiff, and the defendant paid to the plaintiff the required cash sum of \$229,584.27. The market value of defendant's own stock was, in the meanwhile, falling, thus disappointing the anticipations of all parties concerned. Subsequently a number of stockholders of the defendant company became generally dissatisfied with the defendant's management, finding a great many things to blame. They succeeded in assuming control of the defendant company, and on December 6, 1933, the defendant's attorney, Mr. Williamson, orally suggested to the plaintiff that the defendant considered the purchase of its own stock in June, 1933, to be improper. This was the first intimation of any claim by the defendant on account of any of the transactions we have related. No written claim or demand was asserted until December 21, 1933. On December 21, 1933, California-Western States Life Insurance Company sent to American Trust Company a letter claiming that the purchase of said 7,150 shares of stock by California-Western States Life Insurance Company was contrary to law and a void transaction, offering to redeliver the shares of stock of defendant company, but not the shares of Western States acquired in 1931, and demanding the repayment of the sum of \$229,584.27. On January 31, 1934, American Trust Company filed this action against California-Western States Life Insurance Company for declaratory relief. Additional facts will be set forth as the occasion requires.

The plaintiff claims the judgment is not supported by the findings, and that many of the findings are not supported by the evidence. The trial court found that the 1931 repurchase promises and the 1933 repurchase were invalid. It gave judgment to the defendant and against the plaintiff

for \$229,584.27, the cash paid to plaintiff in 1933, plus interest, and ordered the surrender of the notes theretofore delivered to the plaintiff, but it permitted the defendant to retain the Western States stock which it had acquired from the plaintiff's predecessor in 1931.

[1-6] Plaintiff's first point is that defendant may not recover the purchase price paid by it in 1933 for the stock then purchased, since recovery is not necessary for the payment of liabilities of the defendant existing at the time of the 1933 purchase. The ruling of the trial court was doubtlessly based on a long line of decisions that had theretofore been rendered. *Stevens v. Boyes Hot Springs Co.*, 113 Cal. App. 479, 298 P. 508, and *Hansen v. California Bank*, 17 Cal.App.2d 80, 61 P.2d 794. But the plaintiff contends that the statutes have been materially altered by chapter 862, page 1762, of the Statutes of 1931, and that the rule in force when the repurchase was made in 1933 was quite different. In particular it cites and relies on section 365 of the Civil Code as amended by said chapter. Said section is as follows: "Except when shares are purchased in accordance with this title, shareholders selling to the corporation shares issued by the corporation shall be and remain liable to the corporation, or to its receiver or its trustee in bankruptcy *to the extent of payments made* therefor and for the unpaid balance of the subscription price due thereon, if any, *for the payment of existing liabilities of the corporation at the time of such sale.*" (Italics ours.) The plaintiff claims that, in any event, it was not liable if the repurchase was made in "accordance with this title"; that if not so made the plaintiff was liable only "for the payment of existing liabilities of the corporation at the time of such sale"; and then only "to the extent of payments made" to the plaintiff on such repurchase. It also claims it was under no circumstances liable for an "unpaid balance of the subscription price due thereon" because it purchased but never subscribed for any of defendant's stock, and that it never owed any sum on any subscription contract. The defendant takes the position that the plaintiff does not properly construe said section. Continuing it asserts said section, when properly construed, means as follows: "Except when shares are purchased in accordance with this title, shareholders selling to the corporation shares issued by the corporation

shall be and remain liable to the corporation, or to its receiver or its trustee in bankruptcy to the extent of payments made therefor and for the unpaid balance of the subscription price due thereon for the payment of existing liabilities of the corporation at the time of such sale." It bases that claim on the assertion that syntax and the rules of grammar contemplate that qualifying words and phrases ordinarily refer to the next preceding antecedent, and that such is the rule in statutory construction unless the context and evident meaning of the enactment requires a different construction. 23 Cal.Jur.Stats. § 110, p. 733. The plaintiff replies in effect that the context and evident meaning of section 365 gives no room for applying the rule for which the defendant contends. The plaintiff argues vigorously that if the said section is given the construction for which the defendant contends, it follows that: "A corporation able to pay its debts which made an unauthorized purchase of its stock could not recover the unpaid balance of the subscription. But the corporation although fully solvent and able to pay all of its debts could recover the amount paid to the shareholder who would thus receive the stock free of any liability upon his subscription agreement thereby acquiring the stock without paying for it." That is clearly the effect of the defendant's contention. No doubt in certain cases the rule of statutory construction for which the defendant contends will be applied. However, very slight indication of legislative purpose or parity of reason or the natural and common-sense reading of the statute may overturn it and give it a more comprehensive application. *Sutherland on Statutory Construction*, 2d Ed. § 420. So in the instant case. Section 365 of the Civil Code as quoted above is altogether clear in all respects. In *Davis v. Hart*, 123 Cal. 384, at page 387, 55 P. 1060, 1061, the court said: "A cardinal rule of interpretation is that a statute free from ambiguity and uncertainty needs no interpretation. This must be so, for all interpretation and construction is for the purpose of ascertaining the legislative will. When this is clear, interpretation is not allowable. In such case it cannot be argued that the result is unjust or against policy. [The statute] is itself conclusive upon these subjects." See, also, *McNamara v. Steckman*, 202 Cal. 569, 575, 262 P. 297; 25 R.C.L. 957. That is the rule which we think is applicable in the instant case. Except for

the earnestness of counsel we would stop at this point. However, as able counsel vigorously disagree, other considerations will be discussed. The defendant argues that the judgment as rendered by the trial court was authorized prior to the enactment of section 365 of the Civil Code and that said section is not exclusive. The plaintiff contends that it is exclusive, and that the maxim *expressio unius est exclusio alterius* is applicable. In making that reply the plaintiff is right for the reason assigned. Moreover, chapter 862, p. 1762, Statutes of 1931, is, by all parties, treated as and conceded to be a revisory statute. If it is contended that under it more than one remedy exists for the same cause of action, then the person making that claim must be able to quote those provisions from the face of the statute showing the existence of cumulative remedies. Unless reprinted in said chapter, the provisions of the former statutes were repealed. Section 1, c. 862, p. 1763, Stats. 1931. Earlier decisions on the subject based on the provisions of the repealed statutes are no longer controlling. In so far as the new statute changes the remedy, such statute controls. *Hanley v. Sixteen Horses*, etc., 97 Cal. 182, 32 P. 10. The doctrine of that case has never, so far as we are advised, been departed from in this state, nor elsewhere. *Murdock v. City of Memphis*, 20 Wall. 590, 617, 22 L.Ed. 429; 8 Rose's Notes, U.S.Reps. 563-565.

[7,8] The plaintiff, as stated above, contends that its maximum liability is the amount of payments received by it. The defendant asserts said contention is a strained construction of the statute. We think not. It is its plain wording. The point is used by the defendant to introduce a comment on the statements made by the author of the statute. As nothing we have said, or intend to say, is based on that author's statement, we will not pause to consider said comment. Nor will we pause to discuss the statements of legislative counsel. Counsel have not shown that either class of such statements comes within the rule which permits courts to examine the reports, *published by authority of law*, of legislative bodies. *Story v. Richardson*, 186 Cal. 162, 165, 198 P. 1057, 18 A.L.R. 750.

[9-11] Prior to the enactment of chapter 862, p. 1762, Statutes of 1931, it had been held that a corporation desiring to repudiate a contract to purchase its own

stock should return the stock to the seller. *Bank v. Wickersham*, 99 Cal. 655, 34 P. 444. The defendant quotes from section 325 of Ballantine's California Corporation Laws to the effect that the same rule applies to an action maintained under section 365 of the Civil Code, chapter 862, p. 1816, Stats. 1931. It then asserts its construction of said section must be followed. That conclusion does not follow. The rule requiring the return of the stock was one imposed by the court to the end that the aggrieved party should do equity. *Pratt et al. v. Short et al.*, 79 N.Y. 437, 445, 35 Am.Rep. 531; 13 C.J. p. 412, Contracts, § 341. It was not a part of the former statute, nor is it a part of chapter 862, p. 1762, Statutes of 1931. No reason appears why an aggrieved party suing under the latter statute should not do equity as well as one suing under the statutes as they were worded prior to the changes made in 1931. Although the amount of the recovery may be less under the amended statute than under the earlier statute, such fact does not constitute an excuse for a failure to do equity. Nor does the court rule requiring equity to be done in any manner add to, nor detract from, the clear meaning of the former statutes, nor of the statute enacted in 1931.

Defendant also calls to our attention the decisions that were based on provisions in the Civil Code as they were worded prior to 1931. It says the corporation purchasing its own stock was held entitled to recover not only the moneys so expended but to have its unpaid notes canceled and returned. Of course, the answer is that said statutes have been "superseded," and we are concerned with what the statutes provided on June 10, 1933.

[12, 13] The plaintiff calls to our attention the wording of section 365 of the Civil Code, as amended in 1933, St. 1933, p. 1398. The defendant asserts that assuming the amended section is a statute in *pari materia* it may not be considered in interpreting said section as enacted in 1931 unless the latter is ambiguous. But it is the defendant that claims said enactment in 1931 is ambiguous. The plaintiff earnestly contends to the contrary, and, in making its point, it is merely answering a claim set forth by the defendant. Assuming, solely for the purposes of this decision, that section 365, as enacted in 1931, is ambiguous, then it follows that the amendment thereof in 1933 may

properly be examined to ascertain the intention of the Legislature in enacting the statute of 1931. Old Homestead Bakery, Inc., v. Marsh, 75 Cal.App. 247, 242 P. 749. Turning to the amendment of 1933, it is as follows: "When a corporation in violation of any provision of this title, purchases shares issued by it, any shareholder or owner of shares who sells such shares knowing that the corporation is the purchaser with knowledge of facts indicating the impropriety of such purchase shall be liable to the corporation or its receiver, liquidator or trustee in bankruptcy to the extent of the payments received therefor and for the unpaid balance of the subscription price due thereon, if any, in the event that the corporation is adjudged insolvent or bankrupt in any action or proceeding begun within one year after such purchase." Reading the several statutes in pari materia, it is clear that under the statutes prior to 1931 the defendant was entitled to sue for all moneys paid on an illegal purchase of stock theretofore issued by it; that under chapter 862, p. 1762, Statutes of 1931 its right was limited as expressed in section 365 as incorporated in said chapter; and that under said section 365, as amended in 1933, the defendant's right to recover was further limited in several material respects. On the other hand, if section 365, as enacted in 1931, is not ambiguous, then, as stated above, it is not subject to construction and it means just what is said on its face.

The defendant calls attention to the fact that the plaintiff contends the defendant agreed to buy its stock and pay for it out of "earned surplus," and that such agreement was proper. Defendant then asserts such was not the law. Stevens v. Boyes Hot Springs Co., supra. The authority does not support the assertion. The Stevens Case involved noncompliance with sections 309 and 359 as they were worded on July 6, 1922, the date of the purchase there involved. Stats.1917, p. 657, and stats.1921, p. 127. Said statutes were materially different from the provisions of chapter 862, p. 1762, Statutes of 1931. Furthermore, nothing we have said, or intend to say, involves the legality of purchases by a corporation of shares theretofore issued by it. For the purposes of this opinion we are assuming the purchase was illegal.

[14] The foregoing conclusions find abundant support in the context. Title

1, part 4, Division 1, section 277 et seq., Civil Code, chapter 862, p. 1762, Stats.1931, uses the expression "stated capital." Section 300b provides of what it shall consist, and that it shall not be changed except as provided in said statute. In several different sections other provisions are set forth showing it was the legislative will that in the interest of the creditors of the corporation said "stated capital" must be protected and preserved. Then section 342 authorizes, in certain limited cases, a corporation to purchase, out of earned surplus, shares of stock theretofore issued by it. But, having so provided, it adds: "A corporation shall not purchase its own shares of any class in any case when *there is reasonable ground for believing that the corporation is unable, or, by such purchase, will be rendered unable, to satisfy its debts and liabilities when they fall due.*" (Italics ours.) That limitation is re-enforced by section 342a, which provides that a purchase out of earned surplus as provided in section 342, subd. (7), shall not affect "stated capital." The power to declare dividends is, to the same extent, limited by section 346, as the power to purchase its own shares is limited by section 342. Section 347 provides for the redemption of certain shares by certain corporations. But it repeats the limitation expressed in section 342 on the exercise of the power to redeem. Again, section 348 provides for a reduction of "stated capital," and again the same limitation is repeated. By the provisions of section 363 the directors shall neither authorize nor ratify, except as provided in said title 1, part 4, division 1 of the Civil Code, "the purchase by it [the corporation] of its shares with corporate funds nor declare or pay dividends nor authorize or ratify the withdrawal or distribution of any part of its assets among its shareholders." Each of the foregoing provisions is in effect a requirement that the corporation shall so conduct its affairs as to keep its issued capital stock unimpaired. Each is primarily a requirement in the interest of its creditors.

Then follow the remedies. (1) If the prohibited disbursements are "wilful or negligent" the directors are "jointly and severally liable to the corporation and to shareholders and subscribers for the full amount of any loss sustained by the corporation, the shareholders, and/or subscribers." (2) If the corporation is insolvent the liability runs to "the corporation

or its * * * trustee in bankruptcy to the full amount of any loss sustained by the shareholders or creditors." (3) Then section 364 provides: "Any shareholder who knowingly receives any dividend or distribution of assets not authorized by this title shall be individually liable to the corporation for the amount so received by him, with interest from date of receipt, in the event that the corporation is unable to meet its debts and liabilities as they mature. Any two or more shareholders may be sued in the same action." (Italics ours.) And section 365 provides: "Except when shares are purchased in accordance with this title, shareholders selling to the corporation shares issued by the corporation shall be and remain liable to the corporation, or to its receiver or its trustee in bankruptcy to the extent of payments made therefor and for the unpaid balance of the subscription price due thereon, if any, for the payment of existing liabilities of the corporation at the time of such sale." (Italics ours.) Comparing the foregoing provisions, it will be noted that the directors of a solvent corporation who make a willful or negligent violation of the statute (except those who may have caused their dissent therefrom to be entered in the minutes of the meeting at which such action was authorized, or who were not present at the time) shall be liable to the corporation "for the full amount of any loss sustained by the corporation." But, of an insolvent corporation, they are liable to "the full amount of any loss sustained by * * * creditors." A stockholder who knowingly receives any dividends or distribution of assets not authorized is liable "to the corporation for the amount so received by him, with interest from date of receipt, in the event that the corporation is unable to meet its debts and liabilities as they mature." And a stockholder who has sold his stock to the corporation in contravention of the statute is "liable to the corporation, or to its receiver or its trustee in bankruptcy to the extent of payments made therefor * * * for the payment of existing liabilities of the corporation at the time of such sale." In other words, four distinct, separate remedies are delineated. No two are precisely the same. The liability in each of the last two proceedings is "for the payment of existing liabilities of the corporation." The liability in each of the first two proceedings is "the full amount of any loss sustained"—perhaps more or less than the

amount of moneys received. All four are in the interest of the corporation making the payment and the last three are in the interest of defraying obligations to creditors. No single one rests on an obligation to repay, in any event, all moneys received. All four clearly mean that the stated capital will be maintained to protect the creditors.

[15] There is evidence that this plaintiff's assignor bought shares of stock in the defendant corporation; but there is no evidence that it was ever a subscriber for the stock of the defendant. There is no evidence and there is no finding that on June 13, 1933, the defendant had any liabilities nor, if so, the amount thereof. Therefore, the defendant was not entitled to recover. It follows that the findings do not support the judgment, and that the judgment should be reversed.

Several other points are made by the plaintiff, but, in view of the conclusion we have reached on the point hereinabove discussed, it is unnecessary to discuss them.

The judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.



**CALIFORNIA-WESTERN STATES LIFE
INS. CO. v. PACIFIC AMERICAN
CO., Limited.*
Civ. 10429.**

District Court of Appeal, First District,
Division 2, California.

Feb. 1, 1938.

As Modified on Denial of Rehearing
March 3, 1938.

Hearing Granted by Supreme Court
March 31, 1938.

Corporations ¶376

A shareholder which sold stock of corporation to corporation issuing it was not liable to corporation for repayment of moneys received, in absence of showing that, at time of the transaction, the corporation had any liabilities, or, if so, the amount thereof, or any showing that the shareholder was a subscriber for stock of corporation.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

*For subsequent opinion see 98 P.2d 511.

Action by the California-Western States Life Insurance Company against the Pacific American Company, Limited, with respect to the right of the plaintiff to recover payments made by it under a contract to buy stock issued by it. Judgment for the plaintiff, and the defendant appeals.

Reversed.

Macdonald, Schultheis & Pettit, of Los Angeles, and Chickering & Gregory, of San Francisco, for appellant.

Williamson & Wallace, of San Francisco, and Ware & Ware, of Chico, for respondent.

STURTEVANT, Justice.

This is a companion case with American Trust Company, a Corporation, v. California-Western States Life Insurance Company, a Corporation, 76 P.2d 201, this day filed. It was submitted on the same record as the case just mentioned. Separate briefs were filed, which contained references to and passages adopting the briefs filed in the former case. Except as to names, dates, and amounts, the facts are the same. The pleadings are different in some respects, but there is no allegation and there is no finding that defendant was ever a subscriber for the stock of the plaintiff or became indebted on any stock subscription. There is no evidence and there is no finding that on July 21, 1932, the plaintiff had any liabilities, or, if so, the amount thereof.

For the reasons set forth in the above-mentioned case, the judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.



CALIFORNIA-WESTERN STATES LIFE
INS. CO. v. TUCKER.*

Civ. 10437.

District Court of Appeal, First District,
Division 2, California.

Feb. 1, 1938.

As Modified on Denial of Rehearing
March 3, 1938.

Hearing Granted by Supreme Court
March 31, 1938.

Corporations 376

A shareholder which sold stock of corporation to corporation issuing it was not J.

76 P.2d—14

liable to corporation for repayment of monies received, in absence of showing that, at time of the transaction, the corporation had any outstanding liabilities, or, if so, the amount thereof, or any showing that the shareholder was a subscriber for stock of corporation.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by the California-Western States Life Insurance Company against Phyllis De Young Tucker, with respect to the right of the plaintiff to recover payments made by it under a contract to buy stock issued by it. Judgment for the plaintiff, and the defendant appeals.

Reversed.

Garret W. McEnerney and Andrew F. Burke, both of San Francisco, for appellant.

Williamson & Wallace, of San Francisco, and Ware & Ware, of Chico, for respondent.

STURTEVANT, Justice.

This is a companion case with American Trust Company, a Corporation, v. California-Western States Life Insurance Company, a Corporation, 76 P.2d 201, this day filed. It was submitted on the same record as the case just mentioned. Separate briefs were filed, which contained references to and passages adopting the briefs filed in the former case. Except as to names, dates, and amounts, the facts are the same. The pleadings are different in some respects, but there is no allegation and there is no finding that defendant was ever a subscriber for the stock of the plaintiff or became indebted on any stock subscription. There is no evidence and there is no finding that on June 13, 1933, the plaintiff had any liabilities, or, if so, the amount thereof.

For the reasons set forth in the above-mentioned case the judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

*For subsequent opinion see 98 P.2d 511.

25 Cal.App.2d 51

ADAMS et ux. v. DOW HOTEL et al.**Civ. 1696.****District Court of Appeal, Fourth District,
California.****Feb. 10, 1938.****Rehearing Denied March 9, 1938.****Hearing Denied by Supreme Court****April 11, 1938.****1. Innkeepers ⇐10**

An innkeeper must keep hotel premises in reasonably safe condition for guests and must exercise reasonable care to protect guests from personal injury through his negligence.

2. Innkeepers ⇐10

An innkeeper is not an insurer of guest's safety and is only liable for injury to guest caused by innkeeper's negligence.

3. Negligence ⇐4

"Negligence" implies lack of due care.

[Ed. Note.—For other definitions of

"Negligence," see Words & Phrases.]

4. Innkeepers ⇐10

An innkeeper not having actual knowledge of defect in porcelain handle of hot water faucet of bathtub had duty of making careful and frequent inspections of bathroom in a careful endeavor to discover any defective condition that would cause an injury to a guest.

5. Innkeepers ⇐10

Whether innkeeper sued for injuries sustained by guest when defective porcelain handle of hot water faucet of bathtub broke while guest was attempting to turn off the water exercised due care in inspecting bathroom rested in trial court's sound discretion.

6. Appeal and error ⇐996, 1010(1)

A trial judge's conclusion on a question of fact would not be disturbed unless there was an entire lack of evidence or reasonable inferences to be drawn from the evidence to support his conclusion.

7. Innkeepers ⇐10

Evidence held to support finding that innkeeper exercised due care in inspecting bathroom, precluding guest's recovery for injuries sustained when defective handle of hot water faucet of bathtub broke while guest was attempting to turn off the water.

Action for personal injuries by John B. Adams, also known as Jack Adams, and Ethel Adams, husband and wife, against the Dow Hotel and another. From a judgment for the defendants, the plaintiffs appeal.

Affirmed.

Carpenter, Babson & Fendler, of Los Angeles, for appellants.

Randall & Bartlett and Kenneth W. Kearney, all of Los Angeles, for respondents.

MARKS, Justice.

Plaintiffs brought this action to recover damages for injuries sustained by John B. Adams to both hands which were cut when the porcelain handle of the hot water faucet of a bathtub broke when he was attempting to turn off the water. Judgment went for defendants and plaintiffs have appealed.

G. Walter Dow was the owner and operator of the Dow Hotel in Lone Pine, Cal. Dow Hotel is merely the name of the hotel operated by G. Walter Dow. Hereafter we will refer to him as the defendant.

On March 7, 1936, plaintiff John B. Adams became a guest of the hotel and was assigned a room with bath. The accident happened during the late evening of that day, without warning, the porcelain handle of the faucet breaking when Adams attempted to turn off the hot water. One large piece, about one and one-quarter inches long by three-quarters of an inch wide, and some other smaller pieces, broke from the handle. The broken porcelain showed a dark mark between one-half and one inch long where the large pieces fitted together.

There is evidence that the porcelain on handles of hot water faucets will crack due to expansion caused by heat; that a porcelain handle with a crack in it one-half an inch long would be unsafe because of its liability to break under the pressure of turning off the water.

On behalf of defendant it was proved that no porcelain handles had broken before the one in question; that the handle was of a standard make; that the room and bath occupied by plaintiff had been inspected almost daily, and twice on March 7, 1936, and nothing had been found out of order.

The findings of fact contain the following:

Appeal from Superior Court, Inyo County; William D. Dehy, Judge

"The court finds that it is true that on the 7th day of March, 1936, one of the fixtures in the bathroom rented to the plaintiff John B. Adams, to-wit, the right porcelain handle affixed to the bath tub, was in a dangerous and unsafe condition, and that the dangerous and unsafe condition of said right porcelain handle affixed to said bath tub was wholly unknown to said plaintiff and was wholly unknown to the defendant. The court further finds that at all time the defendant exercised reasonable care in the maintenance and operation of said hotel and the rooms, furniture, fixtures, bathroom equipment, appliances and accessories in connection therewith.

"The court finds that it is not true that defendant negligently or carelessly maintained or operated his premises or the bath room rented by the plaintiff John B. Adams. The court further finds that the right porcelain handle affixed to the bath tub, in the bath room adjoining the bedroom rented said plaintiff, did on the 7th day of March, 1936, break off and splinter in said plaintiff's left hand, and while said plaintiff was using said handle and said bath tub in a reasonable manner and for the use for which it was intended.

"The court further finds that it is not true that by reason of any negligence of the defendant, that plaintiff John B. Adams was hurt in his health, strength or activity, or received any of the injuries described in plaintiff's complaint.

"The court finds that it is true that plaintiff John B. Adams suffered a severe and permanent injury to his left hand, and further finds that said injury was sustained by the said plaintiff through no fault or negligence on his part, and without any fault or negligence on the part of the defendant, or any of his agents, servants or employees."

[1] The first question presented here is the duty owed by an innkeeper to his guests. In *Robertson v. Weingart*, 91 Cal. App. 715, 267 P. 741, 744, it is said: "The general rule is, that it is the duty of a hotel keeper to keep his buildings and premises in a condition reasonably safe for his guests."

In *Goldstein v. Healy*, 187 Cal. 206, 201 P. 462, 464, the Supreme Court said: "The innkeeper owes the duty of at all times maintaining his hotel premises in a reasonably safe condition, and of exercising reasonable care to protect them [guests]

while in the hotel and in the part thereof open to the public, from personal injury through his negligence." See, also, *Topley v. Zeeman*, 216 Cal. 182, 13 P.2d 666; *McStay v. Citizens' Nat. T. & S. Bank of Los Angeles*, 5 Cal.App.2d 595, 43 P.2d 560.

The findings in this case present a rather unusual situation. From those we have quoted the trial judge evidently concluded that the porcelain handle was in an unsafe and dangerous condition; that it broke and injured Adams while he was using it in a reasonable and careful manner for the purpose for which it was intended; that Adams was not guilty of contributory negligence. On the other hand, it was found that defendant used reasonable care in the maintenance and operation of his hotel and bathroom equipment, appliances, and accessories, which certainly includes the porcelain handle in question. It was further found that Adams was not injured through any fault or negligence on the part of Dow or his servants, agents, or employees.

These findings compel the conclusions that the bathroom had not been maintained in a condition reasonably safe for guests; that this condition was unknown to defendant; that this condition could not have been ascertained by a reasonably careful inspection which was actually made. In no other manner can we harmonize the findings of the dangerous condition of the porcelain handle with the finding of lack of negligence on the part of defendant.

[2-4] An innkeeper is not an insurer for the personal safety of his guests. 14 Cal.Jur. 325. He is only liable for injury caused by his negligence. *Goldstein v. Healy*, supra. Negligence implies lack of due care. As defendant had no actual knowledge of the defect in the porcelain handle the due care required of him would seem to have been the duty of making careful and frequent inspections of the bathroom in a careful endeavor to discover any defective condition that would cause an injury to a guest. The trial court was of the opinion that such an inspection had been made and that consequently defendant had used due care in the operation of his hotel and in the maintenance of the bathroom fixtures.

[5-7] A decision on the question of the exercise of due care, in other words, the negligence of defendant, is one within

the sound discretion of the trial judge. He having exercised such discretion, his findings will not be disturbed on appeal unless there is an entire lack of evidence or reasonable inferences to be drawn from the evidence to support his conclusions. In the instant case we cannot conclude that the questioned findings lack all evidentiary support. That being the case, the judgment cannot be reversed.

The judgment is affirmed.

I concur: BARNARD, P. J.



25 Cal.App.2d 17

McDONALD et al. v. MASON et al.

Civ. 10728.

District Court of Appeal, First District,
Division 2, California.

Feb. 9, 1938.

Rehearing Denied March 11, 1938.

Hearing Denied by Supreme Court
April 8, 1938.

1. Boundaries ☞37(5)

Evidence supported finding that uncertainty as to boundaries existed at time parties put up a fence, as respects whether line on which fence was built was adopted as boundary line between properties of adjacent owners.

2. Boundaries ☞13

Generally, under deed describing line as bounded by river, boundary would be the middle line of the river, but, if between meander line by which government survey was made and bank of river, there is at time a body of swamp or waste lands, or flats, then patents for lands surveyed would not cover such land, but must be confined to actual limits of meander line, and include no more.

3. Evidence ☞83(3)

In absence of showing to the contrary, court must assume that surveyor followed law and did not run a meander line, under facts and circumstances not authorizing one.

4. Boundaries ☞40(2)

Under deed describing one line of tract as being bounded by river, whether line running along river was or was not a meander line so as to extend boundary to mid-

dle line of river was for trial court sitting without jury.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by George McDonald and others against Mabel Berwick Mason and others to quiet title to a parcel of land. From a judgment for plaintiffs, named defendant appeals.

Affirmed.

Silas W. Mack and John Milton Thompson, both of Monterey, and C. C. Baker, of Salinas, for appellant.

Hudson, Martin & Ferrante and Webster Street, all of Monterey, and Garth V. Lacey, of Salinas, for respondents.

STURTEVANT, Justice.

From a judgment quieting the title of the plaintiffs in and to a parcel of land bordering Carmel river, the defendant Mabel Berwick Mason has appealed.

The Mexican government granted to James Meadows a large tract on the north side of the Carmel river. That grant was confirmed and a patent was issued to James Meadows on May 19, 1859. One of the courses called for in the description contained in said patent is as follows: "Thence leaving the boundary of the Rancho 'Canada de la Segunda' and meandering up the center of the Carmelo River, north seventy-two degrees, forty-five minutes east, seven chains and thirty links to station." From the date of the patent down through the various conveyances the word "meander" does not appear in the history of the plaintiffs' title, nor in the history of the defendant's title. Meadows executed a quitclaim deed to Bralee. That deed described the south line as follows: "* * * on the south by the Carmelo River or the southern boundary of the farm of the aforesaid James Meadows known as Rancho 'Palo Escrito' the said tract of land being part and parcel of the same farm." Bralee conveyed to Berwick by a grant, bargain, and sale deed in 1869. It described the south line as follows: "* * * on the south by the Carmel River, on the southern boundary of the farm of James Meadows." In 1910 Berwick conveyed to his daughter Mabel (now Mrs. Mason, the appellant). That deed adopted the description contained in the deed from Bralee to Berwick just

mentioned above by referring to the book and page wherein the former deed was recorded.

The lands on the south side of the Carmel river were surveyed in 1872. In making the subdivisions certain fractions were created. Later such lands were conveyed by the federal government. A portion thereof was by mesne conveyances transferred to C. S. Fackenthall et ux. In 1908 they conveyed to Philip McDonald. The description describes certain government subdivisions, including lots 3 and 4 of section 24, but does not contain any reference to any monument.

It is not claimed that Carmel river now flows in the identical bed in which it flowed in 1859. When it changed and how it changed its course does not appear. Whether the banks were changed and to what extent they were changed by the formation of land, and whether in imperceptible degrees or by avulsion does not appear.

The patent confirming the grant to James Meadows contained calls showing that the southern boundary was, to say the least, close to the Carmel river. The eighth course described is recited above. The following courses are from station to station. The plat attached to the patent shows a line following the middle line of the river. No evidence was offered attempting to show where the river flowed in 1859. As noted above, the lands south of Carmel river were surveyed and sectionized in 1872. Such surveys refer to and are tied into the lines described in the grant to James Meadows. The record shows lots 3 and 4 of section 24 of the federal survey. Lot 4 overlaps the grant to Meadows and part of the lands in suit. Lot 3 falls wholly outside said grant. The partition map of the James Meadows tract made in 1905 was introduced by the plaintiff and was used to a considerable extent during the trial. That map purports to show the location of the river at that time with reference to the calls contained in the grant to Meadows. An enlargement of the scale of the description of that portion of the territory involved in this litigation shows the same facts more clearly. Scaling the maps, it is noticed at once that in various places the middle line of the river is anywhere from 100 to 600 feet from the so-called "meandering line."

The nineteenth call in the description of the grant to James Meadows gives the

course and distance of the line 32.50 chains in length. In the summer of 1913 the parties jointly built a fence on that line. The area of the ground between that fence and the middle line of Carmel river is about 16 acres. The effect of the judgment appealed from is to hold the line on which said fence was built was adopted as the boundary line between the properties of the plaintiffs and defendant. It is conceded that the findings support the judgment, but the defendant contends that some of the findings are not supported by the evidence. In making that contention the defendant earnestly contends that "The doctrine of agreed boundary cannot be applied unless there was uncertainty as to the location of the true boundary line and the parties were trying to fix the location of the true boundary on the ground." 4 Cal.Jur. p. 429. The defendant sets forth the memorandum opinion of the trial judge and asserts that the judgment against her was based on the sole proposition that when the parties located the fence they were acting under a mistake of law to the effect that the line on which they located the fence was the boundary line between the properties, whereas, as a matter of law, such boundary was the middle line of Carmel river. But the record before us shows that other material matters were adjudicated.

As early as May 4, 1911, the subject-matter of the boundary line between their respective properties had been under consideration between the parties. On that date Mrs. Mason, then Miss Berwick, wrote Philip McDonald as follows: "At last I have seen Mr. Barber, and he says he will be very glad to place the fence, or let you place it as you desire the change. He would like however, to have the line settled as soon as you conveniently can, as he wants to pasture the cows down there somewhere I believe. As I cannot come out and help you put in the stakes, I wonder if Tom Bralee will help you if you need anyone. When I come back I can bring out the map and we can draw up a paper covering the changes which both can sign. And if you think advisable we can have a notary's seal. Father says either way is all right though the latter is possibly the safest for us both. Better yet would be for you to draw up the paper as you like it worded, and for me to sign it sometime when you are in town. We will each need to keep a copy. Take your own time about it, as I am agreeable to wait or settle as soon as I come back, about the

seventeenth of May. Send in your bill for the wire fence when you decide what is fair to both of us. I don't know, and you and Tom do! Would it not be well to state in our paper that the line fence belongs to us equally?" Why a delay followed, the record does not explain. However, toward the end of that year Miss Berwick married Mr. Rhodes, who went to her farm and there attended to certain work for her. About May 1, 1913, Mr. Rhodes was fishing on the Carmel river. Mr. McDonald went to him and the two started to look up and examine the monuments evidencing the boundary line between the parties to this action. Mr. McDonald showed Mr. Rhodes the monument at each end of the line on which said fence was later constructed. He stated to Mr. Rhodes that the fence should be on that line. About a week later Mr. McDonald went to the dwelling house of Mrs. Rhodes and there Mr. and Mrs. Rhodes and Mr. McDonald discussed the location of the fence. Acting in behalf of his wife, Mr. Rhodes wrote out, and Mr. McDonald and Mrs. Rhodes signed, a document as follows: "Memorandum of agreement between Mr. McDonald and Mrs. Rhodes pertaining to fencing boundary between properties. Fencing to be four strand barbed wire, with posts twelve feet apart placed on line of survey as marked by county surveyor. Work to be done as soon as possible after cutting hay on ground at present, said hay and old fence to be property of Mrs. Rhodes. Each party to pay half the cost of fencing." Later the parties consulted Mr. Carmel Martin, an attorney at law. They had him draw up a formal written contract under date of the — day of October, 1913. True it is that said document was never signed by either party; however, Mrs. Mason testified the only objection to it was that it did not provide for gates in the fence. That document, among other things, recites:

"Whereas the true boundary between the parts of said ranchos owned by the respective parties hereto has been uncertain by reason of lack of particular description and survey,—

"Now therefore to establish the exact boundary line between the parts of the above mentioned ranchos owned by the parties hereto, it is hereby agreed that the following described line is and shall hereafter be held to be the true and correct boundary line between the parts of said above mentioned lands owned by the re-

spective parties hereto." Then follows a boundary line which appears to be an exact copy of a part of the southern boundary of the grant to James Meadows as traced and mapped by Lou G. Hare, county surveyor of Monterey county.

Mrs. Mason, called as a witness in behalf of the plaintiffs under section 2055, Code of Civil Procedure, testified that the fence was put up for the purpose of allowing Mr. McDonald to pasture some horses in the tract between said fence and Carmel river. She also testified that no correspondence was had between her and Mr. McDonald. She testified that no written agreements were signed by them or prepared for them to sign. The documents above quoted contradict all those statements. Such statements are further contradicted by a letter written by Mrs. Rhodes to Mr. McDonald on October 18, 1913. The body of that letter is as follows: "Carmel (Martin?) writes to me today that the papers are at Mr. Gould's office for us to sign. Will you please go in there some day before long and sign if they are OK? They seem all right save that the fence was not quite as we desired so I have asked Carmel to put that right and let you know." Mr. Rhodes testified that he consulted Mr. Martin and was advised by him that the boundary line followed the river and that he, Mr. Rhodes, informed Mr. McDonald of the advice. Mr. Martin testified positively that the parties never mentioned to him anything regarding a meandering line; however, he was quite positive they were entirely disagreed as to where the boundary was. He told them to bring him a survey and he would prepare a written agreement for them to execute. That document we have quoted from above. After the fence was built in 1913, and down to the year 1933, the fence remained in place, and, except to gather driftwood and to take a few loads of sand, Mrs. Mason and her agents never exercised any dominion over the ground in dispute.

[1] The contention of the defendant that no uncertainty existed at the time the parties put up the above-mentioned fence in 1913 has no merit. From what has been stated above, there was clearly evidence supporting the finding of the court that an uncertainty did exist. However, as we understand the defendant, her entire claim is to the effect that it was a patent fact that Carmel river was at least near the southern boundary of the James Meadows

grant, although there was no specific call in said grant that designated the river as the south line of said grant. A line ran along the river. The defendant calls it a meander line and therefore not a boundary, but that the boundary would be the middle line of the river.

[2-4] To that claim there are two distinct and complete answers. It will be conceded at once that the general rule is as contended by the defendant, however, there is a well-defined exception. In *Lammers v. Nissen*, 4 Neb. 245, 251, the Supreme Court of Nebraska said: "In *Granger v. Swart*, Fed.Cas.No. 5,685, 1 Woolw. 88, 91, *supra*, the principle is enunciated that if between the meander line, by which the government survey was made, and the bank of the river, there is, at the time, a body of swamp or waste lands, or flats, on which timber and grass grew, and horses and cattle fed, then the patents for the lands surveyed would not cover this land, but must be confined to the actual limits of the meander line, and include no more." That case was appealed to the United States Supreme Court and was affirmed on the identical grounds stated by the state court. 154 U.S. 650 Append., 14 S.Ct. 1189, 25 L. Ed. 562. In the case entitled *City of Denver v. Pearce*, 13 Colo. 383, 22 P. 774, at page 776, 6 L.R.A. 541, the court said: "In descriptions of this nature, the stream is the monument, and the thread of the stream the boundary. The language of the description, however, is but *prima facie* evidence that the grant or deed is intended to convey all that the grantor owns. It is but a presumption. Whether this presumption shall prevail, is in all cases to be determined by a consideration of the language used by the parties, and such surrounding circumstances as are proper to be considered in ascertaining their intention." In *Barnhart v. Ehrhart*, 33 Or. 274, 54 P. 195, 197, the Supreme Court of Oregon said: "But when, for any reason, the surveyor omits to include large tracts of land lying between the meander line as surveyed or as pretended to have been run upon the ground and such streams or bodies of water, the patents for the lots, though referring to the official plat of such survey for identification, are not equivalent to a conveyance of the premises to such navigable stream, lake, or bay, but are grants limited by such meander line." The court cites many authorities. An examination discloses that the case has since been cited and followed

in many other cases. In *Niles v. Cedar Point Club*, 175 U.S. 300, at page 308, 20 S.Ct. 124, 127, 44 L.Ed. 171, the court said: "But, it is urged that the fact that a meandered line was run amounts to a determination by the land department that the surveyed fractional sections bordered upon a body of water, navigable or non-navigable, and that, therefore, the purchaser of these fractional sections was entitled to riparian rights; and this in face of the express declaration of the field notes and plat, that that which was lying beyond the surveyed sections was 'flag marsh,' or 'impassable marsh and water.' But there is no such magic in a meandered line. All that can be said of it is that it is an irregular line which bounds a body of land, and beyond that boundary there may be found forest or prairie, land or water, government or Indian reservation." Some of the authorities cited were cases involving navigable waters. That distinction is of no assistance to this defendant. The record does not show that Carmel river is in fact navigable or that it has been declared a navigable stream. The grant to James Meadows does not show that the southern line was run as a "meander line." At the time it was run, or at any other time, the law did not authorize the surveyor to run a meander line under the existing facts. The statute required that "the public lands shall be divided by north and south lines run according to the true meridian, and by others crossing them at right angles, so as to form townships of six miles square, unless where the line of an Indian reservation, or of tracts of land surveyed or patented prior to May 18, 1796, or the course of navigable rivers, may render this impracticable; and in that case this rule must be departed from no further than such particular circumstances require." 43 U.S.C.A., § 751; R.S.U.S. 2395; Act Cong. May 18, 1796, 1 Stats. 465. In the absence of a showing to the contrary, we must assume the surveyor followed the law and did not run a meander line under facts and circumstances not authorizing one. As shown above, the federal government did not treat the courses numbered 18-24, mentioned in the grant to James Meadows, as a meander line. On the contrary, the later survey made in 1872 tied lots 3 and 4 of section 24 into and adopted said lines as a part of the latter survey. It is clear, therefore, that whether the line running along Carmel river was or was not a meander line was a question

to be determined by the trier of the facts. The trial court found the facts in favor of the plaintiffs. Those findings, as shown above, are supported by an abundance of evidence and are controlling in this court.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



25 Cal.App.2d 32

BLAKESLEE v. TANNLUND.

Civ. 1839.

District Court of Appeal, Fourth District,
California.

Feb. 9, 1938.

1. Physicians and surgeons ⇨18(4)

Petition alleging that dentist performed work of extracting plaintiff's teeth unskillfully, that he improperly constructed dentures which he improperly and unskillfully fitted over broken piece of tooth, and that injuries suffered by plaintiff were caused by failure of dentist to exercise ordinary care, was sufficient as against general demurrer that plaintiff did not allege that dentist failed to exercise degree of care and skill ordinarily exercised by persons engaged in the practice of dentistry in locality in which defendant had his office.

2. Physicians and surgeons ⇨18(6)

In action for pain and suffering and injury to health resulting from negligent dental treatment, plaintiff had burden to establish by evidence that dentist had not used the skill ordinarily exercised by persons of that profession who practiced in that locality.

3. Appeal and error ⇨1040(10)

Where plaintiff in one count sought to recover amount paid to dentist, damages for pain and suffering, injury to health, amount paid for labor while he was unable to work and amount expended in traveling to dentist's office over period of eight months, failure to sustain demurrer on ground of improper joinder of actions which were not separately stated would not justify reversal. Code Civ.Proc. § 427.

4. Physicians and surgeons ⇨18(8)

In action for injuries resulting from negligent dental treatment, evidence sustained finding that defendant was negligent in fitting denture when plaintiff had infection in mouth, and was liable for injuries resulting from such negligence.

5. Physicians and surgeons ⇨18(11)

\$253.80 awarded as special damage as expense of labor hired by plaintiff during time he was unable to work as result of injury to health caused by negligent dental treatment was not excessive.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action for damages alleged to have resulted from negligent dental treatment by Delbert D. Blakeslee against George N. Tannlund. Judgment for plaintiff for \$553.80, and defendant appeals.

Affirmed.

Halbert & Stone, of Porterville, for appellant.

Bradley & Bradley, of Visalia, for respondent.

BARNARD, Presiding Justice.

This is an action for damages alleged to have been sustained by the plaintiff as a result of negligent dental treatment by the defendant.

The following facts appear from the evidence, although not without conflict. The plaintiff, having been advised by his doctor to have all of his teeth extracted, employed the defendant to do this work and to make for him a set of artificial dentures. During the course of the extraction one of his teeth was broken and a portion of a root was left imbedded in his jawbone, which caused a soreness and later an infection. The dentures which were made did not fit his mouth and would not stay in place. Over a period of about eight months he went to the defendant's office once a week, sometimes oftener, and continually complained that the dentures made his mouth sore and especially that he suffered great pain in a certain part of his jaw or gum, where it later developed that a fragment of the root of a tooth remained. The defendant repeatedly attempted to re-fit the dentures after which he would force the lower denture down over the affected

portion of the plaintiff's gum or jawbone. A somewhat serious condition developed, causing the plaintiff considerable pain and suffering and affecting his general health. After the defendant had refused to do anything more for him, the plaintiff went to another dentist, who found an open fistula with pus and found the fragment of a tooth. This dentist removed the broken piece of tooth and made some new dentures which were installed after allowing two weeks for the jaw to heal. The new dentures fitted perfectly and the plaintiff's health immediately began to improve. In this action which followed the court found, among other things, that the dentures made by the defendant were so unskillfully and improperly constructed that they did not and would not fit the plaintiff's mouth; that the plaintiff could not use the same; that the defendant in extracting the plaintiff's teeth performed said work so negligently, unskillfully and carelessly that he left a broken piece of tooth or root in the plaintiff's gum or jaw, upon which he improperly and unskillfully fitted the dentures he had made; and that because of the defendant's negligence and want of skill in these respects the plaintiff's gum became sore and infected, causing him pain and suffering, and injuring his health to such an extent that he was unable to carry on his occupation of farming. The court allowed the plaintiff \$300 as damages for pain and suffering and injury to his health, and \$253.80 as expense reasonably incurred by him in hiring help during the period he was unable to work as the result of the injury thus done to his health. From the judgment entered, the defendant has appealed.

[1,2] It is first argued that a general demurrer should have been sustained because the complaint did not allege that the appellant had failed to exercise that degree of care and skill ordinarily exercised by persons engaged in the practice of dentistry in the city of Porterville, where he had his office. In addition to general allegations of negligence the complaint alleged that the appellant unskillfully and improperly constructed these dentures, that he performed the work of extracting the respondent's teeth unskillfully, that he improperly and unskillfully fitted the dentures over the broken piece of tooth, and that the injuries suffered by the respondent were all caused by the failure of the appellant to exercise ordinary care, skill, and

diligence. These allegations were sufficient as against a general demurrer, *Dunn v. Dufficy*, 194 Cal. 383, 228 P. 1029, although it was still incumbent upon the respondent to establish by the evidence that the appellant had not used the skill ordinarily exercised by persons of that profession who practiced in that locality.

[3] It is next urged that a special demurrer, on the ground that several causes of action were improperly united and not separately stated, should have been sustained. The complaint contained but one count, although the respondent sought to recover the amount he had paid to the appellant, damages for his pain and suffering and injury to his health, the amount paid for labor while he was unable to work on his ranch, and the amount expended by him in traveling to the appellant's office in Porterville over a period of eight months. Nothing was allowed by the court for two of these matters and they may be eliminated from consideration as no prejudice resulted. Assuming that the expense for labor was not an injury to property, within the meaning of the last paragraph of section 427 of the Code of Civil Procedure, this item of damage was one of the results of the injury to respondent's health and the two were very closely connected. If it be conceded that it would have been better practice to plead these items in separate counts no prejudice appears and any possible error is not sufficient to justify a reversal.

[4] The main point raised is that the judgment is not sustained by the evidence. This is based upon the contention that the evidence fails to show any lack of skill on the part of the appellant in connection with this transaction, measured by the standard of practice which prevailed in that locality. It is argued that what is good dental practice in that locality can be established only by the testimony of experts, that there is a total failure in this respect since the only expert produced by the respondent was the second dentist who treated him, and that his testimony shows that he was not familiar with what constituted good practice in the city of Porterville. The appellant contended that the respondent was in poor health at the time his teeth were extracted, that because of his physical condition it was advisable to let this fragment of a tooth remain and let it work itself out, when it could easily be removed, and that this was considered

good practice in that locality. He produced as witnesses three other dentists from Porterville and one from Tulare, who testified that under some circumstances it was advisable to adopt this procedure and let such a root remain for a time. However, these witnesses also testified that it was not good practice to fit dentures over such a fragment of a tooth and keep them there if an infection had developed which was known to the dentist. The respondent's expert testified that the dentures made by the appellant did not fit the respondent and could not have been made to fit him, that when the respondent came to him there was an infection in his jaw and that pus came out, that while it would not be bad practice to let such a root fragment remain temporarily under some conditions, it should not be left for more than a few weeks or a month, and that it was bad practice to keep the dentures in after an infection had developed. This witness did say that he had never been in the office of any other dentist in Porterville and that his knowledge of the way dentistry was practiced there was very general. He had practiced in Porterville for fifteen months, in Venice for fourteen years, and prior to that in Stockton and Fresno. If we disregard his testimony as an expert, the testimony of the appellant's four experts, in connection with other evidence developed at the trial, is sufficient to sustain the judgment. These witnesses all agreed that it would be considered bad practice in that locality to keep dentures in a patient's mouth if an infection had developed in connection with the presence of the fragment of a tooth. The respondent had been seeing the appellant regularly until he went to the other dentist upon the appellant's refusal to do anything more for him. At that time there was a pronounced infection with considerable pus. We do not know how long this had been there, but the appellant's physician testified that he had seen the respondent several times during this period, that on one occasion he examined his jaw, that he thought this was soon after his teeth had been extracted, that at this time there was "either infection or an eruption of the respondent's gum," that the respondent's jaws had all healed up with the exception of this particular area, that he thought something could be done to relieve the condition he found, and that he urged the respondent to go back to his dentist. The respondent's wife testified that during this

period this portion of the respondent's jaw "looked like a canker eruption" and "it looked reddish and it would act like it was cankered, I call it cankered, it had an aggravation," and that she and her husband both informed the appellant of this condition, but he did nothing to relieve it. It may be reasonably inferred from this evidence that an infection was present which was known or ought to have been known to the appellant. While the evidence is conflicting a portion thereof supports the findings and judgment.

[5] The only other point raised is that there was inadequate proof of the amount of the special damage allowed, \$253.80. A number of inconsistencies and conflicts which appear in the evidence are brought out, but it appears even from appellant's statement of this part of the evidence that there was evidence which would have supported a judgment for about \$10 more than was allowed on this particular item. If any error appears it is in appellant's favor and is one of which he is in no position to complain.

The judgment is affirmed.

I concur: MARKS, J.



25 Cal.App.2d 25

BORG v. BORG.

Civ. 10727.

**District Court of Appeal, First District,
Division 2, California.**

Feb. 9, 1938.

**Hearing Denied by Supreme Court
April 8, 1938.**

1. Divorce $\S$ 6 $\frac{1}{2}$, 7

An action for "divorce" is a suit in equity, and, in so far as the action relates to the marriage relation and the termination of the marriage status, it is a proceeding in rem.

[Ed. Note.—For other definitions of "Divorce," see Words & Phrases.]

2. Divorce $\S$ 39

Since the purpose of a divorce action is judicially to declare a dissolution of the marital relation, a prerequisite of the judgment of dissolution is a finding establish-

ing the matrimonial relation, the existence of the res. Civ.Code, §§ 90, 91.

3. Divorce ⇐172

A divorce decree establishes the status of the parties as husband and wife from date of marriage, in subsequent proceedings between the parties.

4. Divorce ⇐172

Where husband and wife married before a divorce decree was entered in Germany dissolving wife's former marriage, and wife obtained interlocutory divorce decree dissolving second marriage, interlocutory decree was a final judicial determination of existence of matrimonial relation as regarded rights of parties thereto, and of property rights of the parties and all matters not suspended until entry of final decree, and was a final adjudication that, as of date of entry, parties were entitled to dissolution of marital status.

5. Divorce ⇐163

Where husband and wife married before a divorce decree was entered in Germany dissolving wife's former marriage, and wife obtained interlocutory divorce decree dissolving second marriage, in so far as interlocutory decree determined the marital status of the parties, it was a judgment in rem immune from collateral attack, except on grounds specified by statute. Code Civ.Proc. § 1916.

6. Divorce ⇐170

Where husband and wife married before a divorce decree was entered in Germany dissolving wife's former marriage, and wife obtained interlocutory divorce decree dissolving second marriage, in so far as interlocutory decree dissolved marital status, its operation was suspended for a full year thereafter, the right of the prevailing party to have a final decree entered at that time depending upon conditions arising after entry of the interlocutory decree, in absence of equitable considerations of fraud or mistake in procurement of that decree. Code Civ.Proc. § 1916.

7. Divorce ⇐156

An interlocutory decree of divorce does not sever the marital relations, but the final judgment alone dissolves the marriage and restores the parties to the status of single persons.

8. Judgment ⇐443(1), 518

An attack upon a judgment upon the ground that it was procured by fraud or mis-

take is a "direct attack," but the fraud which may justify relief is a fraud in procuring the judgment.

[Ed. Note.—For other definitions of "Direct Attack," see Words & Phrases.]

9. Divorce ⇐168

Where husband and wife married before a divorce decree was entered in Germany dissolving wife's former marriage, wife obtained interlocutory divorce decree dissolving second marriage, and sued to set aside property settlement, the husband's action to annul marriage and to enjoin both the suit to set aside property settlement and application for final divorce decree, in which husband ignored interlocutory decree except in prayer for injunction, would not lie, since action constituted a "collateral attack" upon interlocutory decree, which was res judicata.

[Ed. Note.—For other definitions of "Collateral Attack," see Words & Phrases.]

10. Action ⇐53(1)

Equity frowns upon litigation by piecemeal.

Appeal from Superior Court, San Francisco County; John J. Van Nostrand, Judge.

Action by Lawrence Borg against Else Borg to annul their marriage. From a decree of annulment, defendant appeals.

Reversed.

Walter H. Linforth and William M. Cannon, both of San Francisco, for appellant.

L. S. Hamm and B. E. Kragen, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

Defendant, Else Borg, appeals from a decree of annulment of her marriage to plaintiff, Lawrence Borg.

On September 6, 1923, she married Eugen Marder in Germany. The couple soon separated, and later a divorce proceeding was instituted in the courts of Germany. On December 24, 1930, Else Borg, having been informed by letter that her German divorce decree would be entered before that date, married Lawrence Borg at San Jose in this state. On April 25, 1933, she sued Lawrence Borg for divorce on the grounds of extreme cruelty, and on the same date said parties as "husband and wife" executed a property settlement agreement. On April 27, 1933, in said action there was awarded

to her an interlocutory decree of divorce, which decree approved the property settlement. No appeal was taken from this interlocutory decree, and no motion made to vacate it under section 473 of the Code of Civil Procedure, as amended by St.1933, p. 1851, § 34, and same has long since become final, though a final decree of divorce has not been entered. On February 16, 1934, Else Borg commenced an action in equity against Lawrence for the purpose of setting aside and canceling the property settlement on the grounds that she had been induced to enter into it by reason of the undue influence of Lawrence. This suit is now at issue. On June 19, 1934, Lawrence commenced this proceeding for an annulment of his marriage to Else on the ground that at the date thereof she had a former husband living from whom she had not been divorced. He also sought an injunction restraining Else from proceeding in her equity suit to set aside the property settlement and from applying for a final decree of divorce.

Else answered, alleging, among other things, as a separate defense (paragraph XII of the answer), the equitable bar of estoppel; that is, that Lawrence, with full knowledge of the situation of her former marriage, insisted that Else marry him on December 24, 1930; that thereafter, learning the actual date of the German decree, he consented to a new marriage ceremony, but continually postponed it; that, however, he continued marital relations with Else until shortly before she sued him for divorce; that he held her out to the world as his wife; that he averred on income tax returns that such was their status and that his earnings were community property; that thereafter he executed the property settlement agreement as Else's husband; and hence, for all these reasons, he should now be estopped to procure an annulment. Else also filed a cross-complaint setting up her interlocutory decree of divorce as *res judicata* and a bar to this action. At the time of trial plaintiff Lawrence made a motion to strike out said paragraph XII of the answer, alleging estoppel and the cross-complaint. The motion was granted. Thereafter the cause proceeded to trial. Over objections of defendant Else, there was admitted in evidence what appears to be a duly authenticated copy of the divorce decree rendered by the German court. There was little other evidence. The trial court found the fact to be that on December 24, 1930, when the marriage ceremony was performed between plaintiff and

defendant, she was still the wife of Eugen Marder; that by reason of such prior existing marriage plaintiff and defendant were never husband and wife, and defendant was not entitled to a decree of divorce; that the marriage entered into between plaintiff and defendant was void and of no effect. Upon these findings and conclusions, judgment of annulment was entered.

On this appeal the appellant attacks the sufficiency of the copies of the judicial record of Germany purporting to show the proceedings leading to the German divorce. She also attacks a ruling of the trial court in striking out her special defenses of equitable estoppel and of the prior adjudication of the issues in the interlocutory decree of divorce.

[1-3] We confine our decision to the point relating to the effect of this interlocutory decree. An action for divorce under our system is a suit in equity. 9 Cal. Jur. 629; *Wadsworth v. Wadsworth*, 81 Cal. 182, 186, 22 P. 648, 15 Am.St.Rep. 38. In so far as the action relates to the marriage relation and the termination of the marriage status, it is a proceeding in rem. 9 Cal.Jur. 629; *In re Estate of Lee*, 200 Cal. 310, 314, 253 P. 145; *Kelsey v. Miller*, 203 Cal. 61, 91, 263 P. 200; *Delanoy v. Delanoy*, 216 Cal. 27, 34, 13 P.2d 719, 86 A.L.R. 1321. Since the purpose of the action is to judicially declare a dissolution of the marital relation, sections 90 and 91, Civ. Code, a prerequisite of the judgment of dissolution is a finding establishing the matrimonial relation; i. e., the existence of the res. *In re Estate of Lee*, supra. Though the authorities are not in full accord as to whether the res in such proceedings is the prior validity of the marriage or the subsequent singleness of the parties (*Blumenthal v. Blumenthal*, 97 Cal. App. 558, 562, 275 P. 987) it was expressly held in *Re Lee's Estate*, supra, that the decree established the status of the parties as husband and wife from the date of the marriage, and this rule is universal in subsequent proceedings between the parties to the suit for divorce. The limitations of the rule in relation to third parties are not involved here.

[4-7] The effect of the interlocutory decree here pleaded is this: It is a final judicial determination of the existence of the matrimonial relation in so far as the rights of these parties are concerned; it is a final judicial determination that, as of the

date of its entry, the parties were entitled to a dissolution of the status of married persons; it is a final judicial determination of the property rights of the parties and of all other matters not suspended until the entry of the final decree. In so far as this interlocutory decree determines the marital status of the parties, it is a judgment in rem immune from collateral attack, except on grounds specified by the Code—section 1916, Code of Civil Procedure. In *re Estate of Lee*, supra; *Kelsey v. Miller*, supra. In so far as the interlocutory judgment decrees a dissolution of the marital status, its operation is suspended for a full year thereafter. The right of the prevailing party to have a final decree entered at that time is then dependent upon conditions arising after the entry of the interlocutory decree (barring the equitable considerations of fraud or mistake in the procurement of that decree). *Olson v. Superior Court*, 175 Cal. 250, 252, 165 P. 706, 1 A.L.R. 1589; *Gloyd v. Superior Court*, 44 Cal.App. 39, 42, 185 P. 995; *Fisher v. Superior Court*, 110 Cal.App. 567, 568, 294 P. 446. It is the settled rule of these cases that the interlocutory decree does not sever the marital relations, but that the final judgment alone dissolves the marriage and restores the parties to the status of single persons. In *re Estate of Dargie*, 162 Cal. 51, 53, 121 P. 320.

[8,9] The cases are also in harmony on this point: An attack upon a judgment upon the ground that it was procured by fraud or mistake is a direct attack, but the fraud which may justify relief is a fraud in procuring the judgment. *Pico v. Cohn*, 91 Cal. 129, 133, 25 P. 970, 27 P. 537, 13 L.R.A. 336, 25 Am.St.Rep. 159; *Parsons v. Weis*, 144 Cal. 410, 419, 77 P. 1007. The interlocutory decree was not attacked in this proceeding upon any legal ground. It was completely ignored except for the purpose of the prayer for ancillary relief by way of an injunction to restrain the prosecution of the independent suit in equity and the entry of the final decree of divorce. This was a collateral attack against which the interlocutory decree stands as *res judicata*.

The question here involved is settled by *In re Estate of Lee*, supra. That was a contest of a will by the putative daughter of the testator. The contestant was born on July 5, 1895. Her mother and testator were married on May 16, 1895. The testa-

tor was a mulatto; the mother was a white person. The parties were divorced on March 26, 1903. Since the daughter was not mentioned in the will she contested on the ground that, having been born in wedlock, she was presumed to be legitimate. The respondents contended that, since the testator was a mulatto, the marriage was void *ab initio* under the provisions of section 60 of the Civil Code. In sustaining the contestant the Supreme Court said, 200 Cal. 310, at page 313, 253 P. 145, 147: "The judgment of divorce was not impeached, nor was it sought to be impeached by the respondents on any legal ground. Section 1916, Code Civ.Proc. In the absence of such impeachment it must be assumed that the court had jurisdiction over the cause and over the parties. Section 1917, Code Civ.Proc. It must further be assumed that the court found in that action, among other things, that the ceremony in which the plaintiff and defendant participated resulted in their marriage; that they were married persons when the cause was tried; that sufficient grounds for divorce were alleged and proved; and that the plaintiff, the decedent herein, was entitled to a judgment dissolving the bonds of matrimony theretofore and since the sixteenth day of May, 1895, existing between the parties." Here we do not need to assume that the parties were married persons when the cause for divorce was tried—the trial court found that to be true. Further on the court said: "The judgment here under consideration was a conclusive determination of the status of the parties to said action as husband and wife from May 16, 1895, to the dissolution of that relation by the judgment of divorce on March 26, 1903. Said judgment was and is binding upon the parties to the present proceeding and constitutes a judicial determination of a state of 'wedlock' existing between the parties to said action when the appellant was born on July 5, 1895."

Respondent dismisses the *Lee* Case with the statement that a final decree of divorce was there involved. But the applicability of the rule of that case cannot be disregarded for that reason. The final decree merely dissolves the marital relation. The interlocutory rests on the findings of fact which are made on the only evidence taken as to the marriage. Here the trial court in the interlocutory decree found the status of the parties to be that of husband and

wife, and, whether right or wrong, that decree is a conclusive determination of such status against collateral attack.

[10] Having said that a suit for divorce is a suit in equity, we are met by the well-accepted rule of equity that it frowns upon litigation by piecemeal. *Wadsworth v. Wadsworth*, supra. In the absence of all suggestion of fraud, mistake, or other equitable considerations, we must assume that the divorce proceeding here was instituted in good faith to dissolve the marriage relation and to settle the property rights of the parties. All the interests of the respective parties, as well as those of society in general, could have been ad-

justed and determined in that proceeding, and hence there is no necessity and no demand for this litigation, the effect of which is merely to place a cloud over the property rights and interests of the parties and to entail further needless litigation.

We conclude, therefore, that the interlocutory decree was a good defense to plaintiff's action, and that he should be precluded from again litigating the same issue which was heard and determined in the divorce proceeding.

The judgment is reversed.

We concur: STURTEVANT, J.;
SPENCE, J.

10 Cal.2d 653

CITY OF MANHATTAN BEACH v. CORTELYOU et al.**L. A. 15772.**

Supreme Court of California.

Feb. 15, 1938.

1. Appeal and error ⇐1008(3)

Where construction given an instrument by trial court appears to be consistent with parties' true intent, appellate court will not substitute another interpretation, though it be equally tenable.

2. Dedication ⇐15

To constitute a "dedication" of land for public use, there must be an offer by owner to appropriate land for that purpose, and intention to do so must be unequivocally manifested.

[Ed. Note.—For other definitions of "Dedication," see Words & Phrases.]

3. Dedication ⇐19(1)

Doubts and conflicts appearing on a map recorded by owner of realty for purpose of creating a subdivision should be construed most strongly against him in determining whether any part of realty was dedicated to the public, but private property may not be taken for public use except upon unequivocal proof of an intention to dedicate it for public use.

4. Dedication ⇐44

Evidence, including recorded subdivision maps, supported trial court's finding that subdivider did not intend to dedicate to public use a strip of sandy beach between dotted surveyed line and meandering high-tide line.

5. Dedication ⇐19(3)

That certain land is unmarked and not within areas shown as private property on recorded subdivision map does not evidence intention on landowner's part to dedicate land for public use, where it is not included within portion of entire tract which map, by drawing and description, designates as a subdivision carved out of a larger piece.

6. Dedication ⇐20(4)

A landowner's intent to dedicate land to public use may be inferred from long acquiescence in use by the public, but, where land is uninclosed and uncultivated, fact that public has habitually gone on land is ordinarily attributable to a license rather than an intention to dedicate, and it will

not be presumed, from mere failure to object, that owner intended to dedicate land to public use.

7. Dedication ⇐16(1)

Dedication of a strip of sandy beach to public use could not be implied from representations allegedly made to purchasers of subdivision lots that beach would always be for the use of the people as contended by city seeking to establish dedication, where deeds referred to recorded maps which did not show a dedication, and especially where city and county accepted deeds to part of strip long after acts relied upon to establish dedication.

8. Dedication ⇐43

In city's suit to quiet title to public easement over strip of beach allegedly dedicated to the public use, evidence concerning general reputation that strip had been dedicated was properly excluded.

9. Dedication ⇐43

In city's suit to quiet title to public easement over strip of beach allegedly dedicated to the public use by defendants, admitting evidence showing payment of taxes on strip by defendants and their predecessors for limited purpose to show conduct consistent with ownership was not error, even though evidence did not raise an estoppel and was insufficient to rebut proof of dedication, if proof was otherwise sufficient.

10. Evidence ⇐230(3), 244(17)

In city's suit to quiet title to public easement over strip of beach allegedly dedicated to the public use by corporation, statement that corporation had dedicated strip was inadmissible where corporation did not then own strip and the person making the statement was no longer an officer of the corporation.

11. Evidence ⇐230(3)

In action involving title to realty, acts done and declarations made by grantor after he has parted with title are incompetent, especially where declarations were made and acts were done out of presence of adverse party.

In Bank.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Suit by the City of Manhattan Beach against James G. Cortelyou and another, to quiet title to a public easement over a sandy

beach. From an adverse judgment, plaintiff appeals.

Affirmed.

Clyde Woodworth, City Atty., of South Gate, Robert H. Dunlap, of Pasadena, and George R. Larwill, Sp. Counsel, of Los Angeles, for appellant City of Manhattan Beach.

O'Melveny, Tuller & Myers and Pierce Works, all of Los Angeles, for respondent Cortelyou.

Neil S. McCarthy and Earl L. Banta, both of Los Angeles, for respondent Manhattan Beach Development Co.

EDMONDS, Justice.

The City of Manhattan Beach fronts on the Pacific Ocean. Along its westerly boundary lies a strip of sandy beach, about 125 feet wide, which is said to constitute its principal charm and main attraction. By this suit, filed in 1924 but not brought to trial until 1935, the city seeks to quiet title to a public easement over this land which extends from its southerly boundary approximately 3,500 feet to the north. The superior court decided against the city, which appealed from the judgment rejecting its claims.

In 1901 Manhattan Beach Company was the owner of a large tract of land fronting on the Pacific Ocean. This was originally a part of the Rancho Sausal Redondo y Guaspito comprising 22,458 acres and having a westerly boundary which was described in the patent as "following the meanders of the sea beach or easterly shore of shoal water bay at ordinary high water line". The property of the Manhattan Beach Company was conveyed to it by two deeds in which the westerly boundary was described as "ordinary high water mark" and "along the high water mark" of the ocean. The subdivision of this property, according to two maps filed for record in 1901 and 1902 respectively, occasioned the present controversy. By these maps the city contends the owners dedicated for public use the strip of land in question. It also claims that there was an implied offer of dedication by the public use of the property for recreational purposes with the owner's encouragement and consent and that both that offer and the express offers made by the recordation of the maps were accepted. Other points urged as grounds for reversal of the judgment concern rulings on evidence offered at the trial.

Some years after the subdivision maps were filed the interest of Manhattan Beach Company passed to James G. Cortelyou and

later to Manhattan Beach Development Company, who are the defendants in this action and the respondents upon appeal. However, after the suit was filed, their interests passed to other owners who have carried on the litigation in the names of these defendants.

Each of the maps recorded by Manhattan Beach Company shows the land then owned by it which comprised a tract extending some 3,500 feet along the Pacific Ocean and upland for an average distance of probably 1,400 feet. The map filed for record in 1901 shows the subdivision into lots and blocks of a rectangular-shaped parcel lying in the southwest corner of the tract and extending 2,760 feet along the ocean and about 600 feet upland. On the westerly side of this map there is a meander line without designation indicating the shore of the ocean. To the east of this line, and approximately parallel with it, there is another meander line marked "High Tide Line." Farther east and roughly parallel with the two meander lines is a straight dotted line which has no designation. Immediately east of the dotted line a 50-foot right of way for an electric railroad is shown. About 100 feet from the northerly boundary of the land outlined for subdivision the dotted line, which south of this point is shown as being west of the westerly boundary of the right of way, crosses it and continues northerly within the right of way. In other words, for about 100 feet south of the northerly boundary of the property subdivided by this map, the right of way encroaches on the land between the dotted line and the meander line marked "High Tide Line." Between the dotted line and the meander line marked "High Water Line" the words "The Strand" appear twice. To the east of the railroad right of way there is a 15-foot space open to the streets which extend in an easterly and westerly direction, and the blocks nearest the ocean front on this space.

On this map under the heading "Description" appears the following: "The land embraced on this Plat of Manhattan Beach is a part of land * * * conveyed to Manhattan Beach Co. * * * more particularly described as follows, to-wit: Beginning at a 4" x 4" stake known as high water mark of Pacific Ocean at the N W Cor. of said land," thence by metes and bounds "to a 3" x 4" stake at high water mark, thence N 22° 09' W 2760.7 ft. to the place of beginning. * * * Other Lots and Blocks designated therein are only proposed allotments for a supplemental map and

are only introduced to show the lines of So Cal Ry., [not referring to the right-of-way along the beach] the proposed allotments hereafter intended to be made, surveyors' marks and other important bearings. Note: Colored portion only dedicated and recorded by this map."

The northerly, easterly, and southerly boundary of the land described is outlined on the map in red. The closing course of the description, according to the testimony of a surveyor, follows the dotted line exactly. The ends of this line are also colored red; that is to say, for a short distance from the point at which the dotted line meets the line shown as the northerly boundary of the proposed subdivision the dotted line is colored and for approximately the same distance from the point at which it meets the line shown as the southerly boundary of the tract it is also colored.

Under the word "Dedication" the following is also shown on the map: "The Manhattan Beach Company, a corporation, hereby declares that it is the owner of that portion of the lands embraced in the annexed Plot lying within the colored border line thereon, that it has caused the same to be surveyed, plotted, and that it does hereby designate as public thoroughfares all of those portions marked thereon as "The Strand, alleys and public grounds not otherwise deeded for street car purposes." There also appears on the map a certified copy of a resolution of the board of supervisors of Los Angeles county by which it is ordered that all streets and alleys appearing upon the map "and therein offered for dedication be and the same hereby accepted as public streets and alleys."

The map filed for record in 1902 shows as a subdivision all the property comprising the large parcel which is delineated on the 1901 map lying easterly of the dotted line except the rectangular piece which was there plotted into lots and blocks. This land borders the ocean for 700 feet to the north of the first subdivision, and the lines on the first map, which have been described as dividing what may roughly be termed the beach into several strips running parallel with the ocean, continue through the land to the north. In other words, that portion of the land in the second subdivision which fronts on the ocean is depicted in the same manner as is the land along the beach on the first map, with the exception that the dotted line on this map is marked "High Water Line."

Under the title "Description" the following appears on the 1902 map: "The land embraced in this plat of Manhattan Beach Division No. 2, is a part of a tract of land * * * more particularly described as follows, to-wit: Beginning at a point at high water mark of the Pacific Ocean," thence by metes and bounds to the place of beginning. "Other Lots and Blocks designated are only proposed allotments for a supplemental Map and are only introduced to show the line of So Cal Ry, the proposed allotments hereafter intended to be made, surveyors marks and other important bearings. Note Colored portion only dedicated and recorded by this Map." The boundaries so described are colored red, this map differing from the first one in that the dotted line which is the westerly course is entirely instead of partly colored. Under the word "Dedication" the map also shows the following: "The Manhattan Beach Company, a corporation, hereby declares that it is the owner of that portion of the lands embraced in the annexed plat lying within the colored border line thereon; that it has caused the same to be surveyed and platted and that it does hereby dedicate as public thoroughfares all of those portions marked thereon as Streets, the Strand, alleys and public grounds, not heretofore deeded for Street Car purposes. * * *"

At the opening of the trial the respondents filed a written disclaimer of any interest in the land which is shown on the 1901 map as lying between the dotted line and the electric railway right of way. This is a wedge-shaped strip extending from the southerly boundary of the land originally owned by Manhattan Beach Company, at which point it is about 8 feet in width, approximately 1,100 feet to the north where the dotted line meets the westerly boundary of the right of way. The respondents also disclaimed any interest in a piece of beach land shown on the 1902 map which had been conveyed to the city by deed some years before.

Concerning the claim of the city that the property in controversy had been dedicated to public use by the recordation of the two maps, the trial court found that so much of it as is shown on the 1901 map was "depicted upon said map as lying wholly outside said tract and likewise as being wholly outside the area dedicated and recorded by said map. * * * It was not the intention of said Manhattan Beach Company to include or to show any

part of the property in controversy upon the recorded map of such tract, nor did it do so. It was not at any time the intention of said Manhattan Beach Company, either by the filing of such map for record or otherwise, to dedicate or offer to dedicate to or for public use any part of the property now in controversy, nor did it do so. Neither the recordation of said map nor any other act or thing done in connection therewith constituted either a dedication or an offer to dedicate the property in controversy or any part thereof to or for public use." A finding concerning the map filed in 1902 states the same conclusions in almost identical language.

[1] The appellant challenges the sufficiency of the evidence to support these findings. It contends that the maps are ambiguous and that it is the duty of this court to construe them without reference to the construction placed upon them by the trial court. However, the true rule in this regard was stated in the case of *Kautz v. Zurich General Insurance Co.*, 212 Cal. 576, 582, 300 P. 34, 37, where this court said: "The construction given the instrument by the trial court appears to be consistent with the true intent of the parties, and, where that is the case, the appellate court will not substitute another interpretation, though [the latter] seem equally tenable." But the findings of the trial court in this case need not be measured by that rule because the record shows that evidence was received concerning the extent of the land locally known as "The Strand" at the time of the recordation of the two maps. Therefore, the findings of the trial court concerning the land offered for dedication by the maps rests in part upon evidence other than what is shown by the maps themselves.

[2] To constitute a dedication of land for public use there must be an offer by the owner to appropriate it for such purpose, and the intention so to do must be clearly and unequivocally manifested. This is the vital principle of dedication. It was stated in the early case of *Harding v. Jasper*, 14 Cal. 642, 648, and has been consistently followed since. *Smith v. San Luis Obispo*, 95 Cal. 463, 30 P. 591; *Niles v. City of Los Angeles*, 125 Cal. 572, 58 P. 190. Therefore, unless the maps recorded by Manhattan Beach Company and the evidence before the trial court in connection therewith show that clear and unequivocal intention on the part of the owner of the property which the law

demands, they passed no title to the property in controversy.

[3, 4] The appellant contends that the data on the two maps compel a holding that Manhattan Beach Company clearly intended to dedicate the property in controversy to public use; that each map embraces all land between the line of mean high tide shown thereon and the easterly boundary of the tract owned by the company; that the dotted line extending between the stakes at the southwesterly and northwesterly corners of each subdivision is a transit or meander line and was not intended to indicate any boundary; and that the colored lines imposed upon portions of the dotted line on the 1901 map, even if it be deemed that they were completed, only follow this transit or meander line. The respondents, on the contrary, assert that the maps and the data appearing upon them, together with the evidence which was received to show the location of "The Strand," abundantly support the findings of the trial court.

A comparison of the maps shows that they are substantially the same so far as the method of describing the property to be subdivided and the form of the dedication clause is concerned. The description on each is by metes and bounds and includes a statement that "other lots and blocks designated" are shown only as "proposed allotments for a supplemental map." Each description is further qualified by the statement that "Colored portion only dedicated and recorded by this map." The two maps without question were prepared and recorded in order to plat in two subdivisions the entire parcel of land shown on each of them. The same westerly boundary line is described as the boundary for each subdivision and the maps may properly be construed together to determine the intention of the dedicator.

One of the principal grounds urged by the city in support of its claims is the fact that "The Strand" is named in each dedication clause. The respondents' answer to this contention is that "The Strand" was dedicated only if it lies within land particularly described and bordered as a subdivision. In this connection they claim that the maps and the evidence received in connection with them show that at least a part of "The Strand," as it was known at the time of the recordation of the maps, was within the described boundaries of the proposed subdivisions, and that the language in the dedication clause referred to that land

and not to the part of the beach which is here in controversy.

Although it is true that ordinarily the terms "high water line" and "high water mark" are synonymous (*F. A. Hihn Co. v. City of Santa Cruz*, 170 Cal. 436, 442, 150 P. 62), in this case the dedicator used them as referring to two different points on its land and made its maps accordingly. A solid meander line and a dotted straight line are shown on each map. Although the distance between them is not stated in feet, it may be estimated by the scale of the map as being 50 feet or more. Obviously the solid line was intended to define the sinuosities of the ocean's shore. The dotted line is a straight line between surveyor's marks shown on the map and mentioned in the metes and bounds descriptions. They are given different names, which is some indication that the map-maker considered them as representing different positions on the land. Also, the lines representing the northerly and southerly boundaries of the property owned by the dedicator and shown on each map extend to the dotted line but not to the meander line. The land shown on each map between the dotted line and the solid line has no indicated northerly or southerly boundary. All of these facts clearly and consistently point to an intention on the part of the dedicator to make the westerly boundary of each subdivision a surveyed line easterly of and at a distance from the high tide line named in the conveyances to it. Although doubts and conflicts appearing upon a map prepared and recorded by the owner of real property for the purpose of creating a subdivision of it are to be construed most strongly against him (*Larkey v. City of Los Angeles*, 70 Cal. App. 635, 641, 233 P. 991), the law has never allowed private property to be taken for public purposes except upon clear and unequivocal proof of an intention to dedicate it for such use. *Niles v. City of Los Angeles*, supra. "It is not a trivial thing to take another's land, and for this reason the courts will not lightly declare a dedication to public use." *City and County of San Francisco v. Grote*, 120 Cal. 59, 52 P. 127, 128, 41 L.R.A. 335, 65 Am.St.Rep. 155.

The appellant contends that the findings of the trial court ignore the words "The Strand" shown as a legend between the solid and dotted line of each map and included in the dedicatory clauses. However, the evidence received by the court in connection with the maps shows that at the

time they were recorded the right of way had been conveyed but the electric railroad had not been built; that "The Strand" was then locally known as the land extending from the westerly tier of lots in each subdivision to the high tide line; that at this time there was a walk, adjoining the railroad right of way on the east which was signposted "The Strand," and that this walk has been so designated on maps subsequently prepared by the city. When the maps are read in connection with this evidence, the descriptions of property on each, and the respective dedication clauses, they compel the conclusion that only the portion of "The Strand" lying east of the dotted line was dedicated to public use. Although between the northerly and southerly boundaries of the subdivision created by the 1901 map the dotted line is not colored for its entire distance, this is of no consequence when all the evidence bearing upon the question is considered. None of "the land embraced in this plat of Manhattan Beach" lies westerly of the dotted line, according to the metes and bounds description, and, when all the data on the map are considered as a whole, nothing is presented from which an inference may fairly be drawn that the Manhattan Beach Company intended to appropriate the property lying between that surveyed line and the high tide line to the use of the public. Without such an intent there can be no dedication.

[5] The case of *City of Los Angeles v. McCollum*, 156 Cal. 148, 103 P. 914, 23 L.R.A., N.S., 378, which is strongly relied upon by the appellant, decides a question dependent upon the intention of the person who recorded the subdivision map construed in that case, to dedicate for public use a certain piece of land which was not marked as a street. It was there held that the trial court was authorized, if not bound to conclude, from an inspection of the map, that this land was intended as a public highway. The same thing may be said of the land shown by the maps in this case as lying between the railway right of way and the westerly tier of blocks. But the *McCollum* Case presents neither reason nor authority for a holding that land lying without the limits of a proposed subdivision as shown on a map and also not included within the metes and bounds description of it is offered for dedication. Likewise, in the case of *Gross v. City of San Diego*, 125 Cal.App. 238, 13 P.2d 820, there was no question whether the land there in controversy lay within or without the exterior

boundary of the subdivision which was created by recording a map of it. The contentions of the City of Manhattan Beach concern the boundary line of the proposed subdivision. The fact that certain land is unmarked and not within areas shown as private property does not evidence any intention on the part of the landowner to dedicate it for public use where it is not included within that portion of the entire tract which the recorded map, by drawing and description, designates as a subdivision carved out of the larger piece.

[6,7] As the second ground for the reversal of the judgment, the appellant claims that an implied dedication of the property in controversy was made by the predecessors in title of the defendants. Specifically, it is the contention of the city that the acts of Manhattan Beach Company in the years 1901 to 1904, inclusive, unequivocally manifested an offer to dedicate the beach land to public use for park and playground purposes, and that the finding of the trial court to the contrary is not supported by the evidence. The evidence relied upon by the city to establish such dedication consists principally of representations made by salesmen of Manhattan Beach Company to prospective purchasers of lots in the subdivisions. Certain acts of the subdivider which concern the use of the land are also relied upon in this connection.

Apparently about the time the subdivision maps were recorded the company commenced a campaign to sell its lots. This was before automobiles were in common use and Manhattan Beach, strange as this now seems, was quite inaccessible to Los Angeles, which had barely started its phenomenal growth. Until 1904, when the Pacific Electric Railroad was completed, the only means of transportation to Manhattan Beach was by the Santa Fé Railroad. Excursion parties were organized for prospective purchasers, and they were taken to the property by train. Maps of the site were distributed on the train, and at the property salesmen pointed out to the excursionists the advantages of the various lots which the company had for sale. Apparently three different maps were used in the sales campaign. One seems to be an exact copy, reduced in size, of the platted area shown on the subdivision map recorded in 1901, but the metes and bounds description, the dedication clause, and the colored boundary do not appear on it. Another is almost the same except that the

meander lines along the beach are unmarked and the dotted line is not given. On the back of this map there is a summary of the advantages of the new community, one being "a beach that is unsurpassed for velvety smoothness." The third map is the same as the one just described, but the advertising on the back is different. On this map the natural conditions surrounding the property are said to include a "wide sandy beach that cannot be equalled for safety and smoothness."

Several persons who purchased lots in those early years testified that they were shown the map first described, and that certain representations were made to them concerning "the Strand." According to the testimony of these witnesses, one was told that "the beach would always be for the use of the people of Manhattan." To another the salesman said that "the strand was dedicated to the public." A third witness recalled that the salesman assured him "that there will be no buildings allowed on the Strand, except a bathhouse which the company is going to erect for the benefit of the public and the purchasers of lots." Another witness declared that he asked the salesman "about dedication of that property from the lots shown on this map fronting what is designated on the map as the Strand. I told him that I would not consider buying any of those lots down there unless that Strand and all the property between those lots I have just referred to and the ocean would be forever open to the public, nothing would be put on them." According to the witness, the salesman replied that the land "was dedicated from those lots that are shown on this map clear to the water and that nothing would ever be put on there except the railroad" which then had not been built.

In addition to this evidence, the city proved that from at least 1900 the beach has been used by the public generally for bathing, fishing, and general recreation purposes. It was admitted that there were comparatively few people along the beach in those early years, but those who came were never interfered with in any way. As a matter of fact, Mr. Cortelyou testified that they invited people to use the beach, "advertising the invitation extensively." In 1903 the Manhattan Beach Company constructed a bathhouse on the beach and also built some picnic booths "designed to constitute an invitation to the

public to use the beach." Signs were placed on these structures reading, "Private property; permission to pass over revocable at any time," but no similar signs were placed elsewhere on the beach, nor was it ever roped or fenced off. Prior to the commencement of this suit the public has roamed over the beach at will.

This evidence, the city contends, should be considered as if no map had ever been recorded and as sufficient in itself to show an offer to dedicate the beach and an acceptance of that offer. However, a clear distinction must be drawn between the effect of representations made to prospective purchasers of lots in the subdivisions and the legal situation resulting from the general use of the property by the public without objection from the owners. Also, it must be remembered that this is an action by the city to establish a dedication of property for public use. The rules concerning dedication and those which define the rights of those who purchase property with representations that certain streets or other areas are or will be assigned for the benefit of the public are quite different. Much of the confusion in the reported cases is due to a failure to recognize that one who has bought property from a subdivider may have rights which the courts will enforce, although there has been no dedication for the use of the public generally. *County of Inyo v. Given*, 183 Cal. 415, 191 P. 688; *Eltinge v. Santos*, 171 Cal. 278, 152 P. 915, Ann.Cas. 1917A, 1143. Cities or counties seeking to establish a dedication stand in an entirely different position from that of an individual who brings an action to quiet title to a private easement.

The City of Manhattan Beach relies strongly upon the case of *Phillips v. Laguna Beach Co.*, 190 Cal. 180, 211 P. 225, 226, but the facts upon which that decision was made are essentially different from those which are here shown. In that case, the defendant created a subdivision by recording a map which showed certain blocks divided into lots, and other rectangular-shaped areas numbered as blocks but not otherwise marked. Within a few days after this map was recorded, the corporation passed a resolution that within this subdivision certain property which was particularly described "shall be reserved for park purposes." It also advertised that "the entire ocean frontage" had been reserved for a park. It was held that the land described in the resolution,

which did not include all the areas marked only as blocks situated along the ocean frontage, had become a public park upon the ground that the resolution was a present offer to dedicate the land described and that the offer had been accepted by the public. Had the representations of the subdivider been held to have amounted to an offer to dedicate, "the entire ocean frontage" would have been included in the park, which the court limited to the area described in the resolution. There is nothing in this decision to support the claims of City of Manhattan Beach that representations made by a subdivider are sufficient to constitute an offer of dedication. On the contrary, the court came to an exactly opposite conclusion.

A somewhat different situation appears in the case of *Venice v. Short Line Beach Land Co.*, 180 Cal. 447, 181 P. 658, 661. There it was shown that the subdivider had made a tentative map upon which the strip of land in dispute was designated as an alley or street. Thereafter, a map was filed upon which it was marked as lot 38. The record showed that in making sales of lots the subdivider represented to several of the purchasers that this strip would be left open for a public street. Houses were afterward built upon the lots on each side of "lot 38," several of the owners placing sidewalks on the land which they considered to be a public way, and it was used as such for nine years preceding the trial of the action. The evidence showed that vehicles had no other means of access to the buildings on one side of the land used as a street. "This evidence," the court said, "sufficiently shows the intention of the owners that this strip of land should be used by the public as a public street or alley for the convenience and benefit of the public and of the owners of lots abutting thereon." But "this evidence" is not limited to the representations of the subdivider. It includes the improvement and use of the street for many years in a manner wholly inconsistent with the retention of private ownership, and the fact that the street provided the only means of access to some of the lots. The decision is, therefore, not controlling upon the issues presented by the City of Manhattan Beach.

Acts of a landowner from which the law implies a dedication of his property for public use as a street do not always lead to the same result where land is used for other purposes. This is very clear-

ly illustrated in the case of *F. A. Hihn Co. v. City of Santa Cruz*, 170 Cal. 436, 150 P. 62, 67. There the city claimed that it had acquired title to a strip of land several hundred feet long adjoining a sand beach extending to the line of ordinary high tide. For many years, the part of the property in controversy which was situated next to the beach had been used by the public for bathing and general recreation purposes. The other half was in use as a public highway or esplanade, and several years before the city had improved it with pavement.

In this case it was held that the improvements made by the city so changed the character of the land used as a highway as to render it unfit for any other use and that the city had become the owner of at least an easement "coextensive with the use made by it under its authority." But the evidence concerning the use of the other part of the land required a different conclusion, the court held. This land had not been improved and presented the same appearance as the beach along the high tide line. For many years the public had used it in the same manner as the adjoining beach. The owner never made any objection to this use of its property, and the city enforced ordinances regulating public beaches upon it as well as upon the land closer to the water.

"This evidence," the court said, "was not sufficient to establish the city's ownership of a prescriptive right in the land. The use by the public would not vest an interest in the city for the reason, among others, that the use was by the public generally, not merely by the inhabitants of Santa Cruz. The mere fact that the city passed ordinances regulating the use of its public lands and that its officials undertook to enforce those ordinances on private property certainly falls far short of fulfilling the requirements of an adverse possession. * * * But beyond all this, we think the evidence was not such as to support a finding of dedication. In order to constitute a valid dedication, there must be an intention on the part of the owner to devote his property to the public use. *California Navigation Co. v. Union Transportation Co.*, 126 Cal. 433, 58 P. 936, 46 L.R.A. 825; *Niles v. Los Angeles*, 125 Cal. 572, 58 P. 190. It is true that this intent may be inferred from long acquiescence in a use by the public. 13 Cyc. 455. But, where land is uninclosed and uncultivated, the fact that the public has

been in the habit of going upon the land will ordinarily be attributed to a license on the part of the owner, rather than to his intent to dedicate. 13 Cyc. 484. This is more particularly true where the user by the public is not over a definite and specified line, but extends over the entire surface of the tract. 13 Cyc. 484. It will not be presumed, from mere failure to object, that the owner of such land so used intends to create in the public a right which would practically destroy his own right to use any part of the property."

Application of these principles to the facts presented by the *City of Manhattan Beach* indicates clearly that the representations of the subdivider did not amount to an offer of dedication, and, in any event, that there was no acceptance of such an offer. The evidence also shows that the deed made by *Manhattan Beach Company* to each purchaser of property referred to a recorded map; hence the grantee took with notice that the portion of "The Strand" lying westerly of the dotted line shown on that map had not been dedicated. The declarations that are said to have been made to individual buyers of lots conferred no rights upon the public and no dedication resulted from them.

The *Manhattan Beach Company* claimed title to the strip of beach and exercised acts of dominion over it long after the recording of the two maps and the making of the representations testified to by the several witnesses; this is shown by deeds which were later executed conveying certain portions of, and in one instance, all of the land. In 1907 the company gave the county of Los Angeles a deed to a strip of land extending 20 feet on each side of the center line of Center street, the main east and west street of the village, and the prolongation thereof to the Pacific Ocean. In 1909 a small parcel lying at the extreme southerly end of the strip of beach was conveyed to the city of *Hermosa Beach*. This deed described the property conveyed as being bounded on the west by the Pacific Ocean. In 1912 the corporation conveyed to the respondent *Cortelyou* a large number of lots in each subdivision and also the strip of beach land, which is described as being bounded on the west by the Pacific Ocean. In the same year Mr. *Cortelyou* rented to the city a small real estate office which was located at the entrance to the pier and was used by the city manager. In 1915 the city accepted from Mr. *Cortelyou* a deed to that portion of the beach land

extending for 100 feet on each side of the prolongation of Center street from the railroad right of way "to the waters of the Pacific Ocean." Later title to the property now claimed by the city passed from Mr. Cortelyou to the respondent Manhattan Beach Development Company, and in 1921 the latter made some plans, which were known to the then city attorney, to record a subdivision map of it.

It thus appears that, long after the acts which are relied upon to establish dedication, the county of Los Angeles and the appellant accepted deeds to part of the land, and that the city asserted no title to the land which it now claims when it was dealt with by Manhattan Beach Company and its grantees as their own. These acts of the city are entirely inconsistent with its present position. They constitute a recognition of the rights of the respondents and their predecessor at the very time the city now claims it had acquired title by dedication, and are at least an interpretation by conduct of the dedication clauses on the maps. *City of Oakland v. Oakland Water Front Co.*, 162 Cal. 675, 124 P. 251.

[8,9] The appellant also claims that each of several rulings of the trial judge upon the admission of evidence is erroneous. First, it contends that it should have been allowed to offer evidence concerning the general reputation that the property had been dedicated. This contention cannot be sustained. "A public highway cannot be proven by showing that it was generally reputed to be a highway." *Shepherd v. Turner*, 129 Cal. 530, 62 P. 106, 108. Its second point concerns the admission of evidence showing the payment of taxes upon the property by the respondents and their predecessors. Such evidence does not raise an estoppel (*Lantz v. City of Los Angeles*, 185 Cal. 262, 196 P. 481) and is not sufficient to rebut the proof of dedication if the proof is otherwise sufficient (*City of Venice v. Short Line Beach Co.*, supra), but the record shows that it was received for the limited purpose of showing conduct consistent with the ownership of the property. There was no error in that ruling.

[10,11] The appellant also asserts that the court erred in refusing to receive into evidence the declarations of John A. Merrill, made in 1925, that the Manhattan Beach Company, of which he was president at the time the subdivision maps were filed, had dedicated the land. The corporation

did not own the land at the time Mr. Merrill made the proffered statement, which therefore was inadmissible for any purpose. The acts and declarations of a grantor made after he has parted with title are uniformly held to be incompetent (*People v. Southern Pac. R. Co.*, 68 Cal.App. 153, 228 P. 726), and a fortiori this principle applies to a former officer of a grantor corporation. *Ferguson v. Basin Consolidated Mines*, 152 Cal. 712, 93 P. 867; 10 Cal.Jur. 1092. This rule is especially applicable when the declaration is made out of the presence of the adverse party. *Rocha v. Rocha*, 197 Cal. 396, 240 P. 1010.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.



10 Cal.2d 705

PEOPLE v. THORNE.

Cr. 4136.

Supreme Court of California.

Feb. 17, 1938.

1. Criminal law ⇨372(5)

In prosecution for grand theft, where accused had obtained large sum of money from prosecuting witness by representing that accused had a device whereby denomination of \$1 bills could be enlarged, and accused disappeared with the money, testimony of a third party, that prior to the offense accused had advanced same proposition to third party, was admissible as tending to show a common scheme of accused.

2. Larceny ⇨50

In prosecution for grand theft, where accused had obtained large sum of money from prosecuting witness by representing that accused had a device whereby denomination of \$1 bills could be enlarged, and accused disappeared with the money, testimony of a third party, that prior to the offense accused had advanced same proposition to third party, at which time accused carried same equipment which was displayed to prosecuting witness, was admissible as tending to show that accused had means to commit the offense.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Bill H. Thorne was convicted of grand theft, and he appeals.

Affirmed.

Prior opinion, 70 P.2d 680.

Horace Appel, of Los Angeles, and O. O. Askren, of Roswell, N. M., for appellant.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and Buron Fitts, Dist. Atty. of Los Angeles County, and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for the People.

Earl Warren, Dist. Atty. of Alameda County, Ralph E. Hoyt, Chief Assistant Dist. Attorney, and Nathan Harry Miller, Deputy Dist. Atty., all of Oakland, amici curiae.

WASTE, Chief Justice.

In an information filed by the district attorney of Los Angeles county, the defendant was charged with grand theft. He was tried by jury and convicted, whereupon he prosecuted this appeal from the judgment and order denying his motion for a new trial.

It appears that on or about November 13, 1936, defendant represented to the prosecuting witness that he had a device whereby he could enlarge the denomination of \$1 bills. Three days later the parties repaired to an apartment house where the "victim" delivered approximately \$2,600 in bills of varying denominations to the defendant. The bills of larger denomination were to be used solely for the purpose of getting imprints thereof which were to be transposed or transferred on to the \$1 bills. The larger bills were to be returned to the prosecuting witness. Subsequent developments proved that defendant had understated his ability. Rather than merely change the denominations of the smaller bills, as promised, he caused all the bills to completely disappear. Briefly, the evidence discloses that the change in denomination of the smaller bills was to be accomplished by immersing the bills of larger denomination in a solution and then by means of a press and other paraphernalia to transpose or transfer on to blank paper the imprints of said bills which, in turn, were then to be similarly transposed or transferred on to the smaller bills which, in the meantime, also had been immersed in a solution and

the color and printing removed therefrom. One of the solutions essential to the transposition was kept in the bathtub of the apartment. Defendant made frequent, but unaccompanied, trips to the bathroom for the ostensible purpose of there immersing the bills that had been delivered to him. On one of these trips he emerged from the bathroom with something wrapped in a towel and put it in a small black bag that theretofore had served to transport the essential equipment. After all the bills had been thus treated, defendant brought from the bathroom what appeared to be the complete stack of bills delivered to him by the prosecuting witness, with a \$1 bill on the top and bottom. This stack was placed in the press. Defendant then stated that it was necessary for him to go to his distantly removed hotel for additional equipment. The prosecuting witness drove defendant to the hotel. While he waited in his automobile, the defendant, with the black bag, entered the hotel presumably to get the additional equipment. Defendant failed to return. Upon his return to the scene of the operations, the prosecuting witness found that the package which defendant had placed in the press consisted of a large stack of blank paper placed between two \$1 bills. The jury in convicting defendant of grand theft as charged undoubtedly concluded that defendant, under cover of a towel, had placed in the bag the bills that had been delivered to him and, at the first opportunity, departed with them to places unknown.

There is also in the record the testimony of the secretary of the prosecuting witness, who related that the defendant came to their office during the morning and afternoon of November 16, 1936. It was later that day that the money was delivered to the defendant.

The arresting officers testified that at the time of his arrest the defendant had in his possession approximately \$1,400 in currency, some of which appeared to have been immersed in a liquid, and also a black bag and paraphernalia similar to that described by the prosecuting witness.

Defendant's sole contention on appeal is that the trial court erred to his prejudice when, over objection, evidence was admitted to the effect that approximately two weeks prior to the offense of which he here stands convicted, the defendant approached the witness Merritt and informed him he had a way of transferring \$10 bills on to \$1 bills. The witness failed to evince

interest in the plan. The witness also testified that defendant at the time had a black bag and certain equipment similar to that identified by the prosecuting witness herein.

[1] We find no error in the admission of this evidence. Though he did not take the stand on his own behalf, the defendant relied on an alibi defense and sought to prove by other witnesses that he was elsewhere at the time of the commission of the offense of which he stands convicted. The evidence that shortly prior to the commission of such offense, the defendant had represented to a third person that he could raise the denomination of \$1 bills tends to establish a common scheme or plan on his part to defraud the public by having gullible persons deliver to him possession of their money for such purpose whereupon he would depart with it. As stated, the evidence complained of tends to establish a common scheme or plan and the testimony of the witness Merritt was therefore admissible as tending to show that the theft of which defendant here stands convicted was committed by him as a part of his scheme or plan, and this whether it be regarded as theft by false pretenses or theft by trick and device. *People v. Whiteside*, 58 Cal. App. 33, 38-41, 208 P. 132; *People v. Helmlinger*, 69 Cal.App. 139, 141, 142, 230 P. 675; *People v. Munson*, 115 Cal.App. 694, 695, 699, 2 P.2d 227; *People v. Edwards*, 133 Cal.App. 335, 339-341, 24 P.2d 183. In passing, it may be stated that one of the arresting officers observed defendant prior to his arrest in conversation with the witness Merritt.

In the case first above cited, the witness Stivers testified that approximately two months after the commission of the offense for which the defendant therein was on trial, the defendant had made representations to him similar to those made to the prosecuting witness therein. In approving the admission of this evidence it was declared on appeal, 58 Cal.App. 33, at page 39, 208 P. 132, 134, that: "If viewed with respect to its relevancy as tending to show that the facts constituting the charge contained in the information were a part of a scheme to defraud the public as distinguished from a single individual, it was not necessary, in order that Stivers' testimony be admissible, that an attempt be shown to have been made to sell him any stock or that the evidence, if accepted as true,

should tend to show the commission of an offense like in character to the one charged."

In *People v. Sindici*, 54 Cal.App. 193, 196, 201 P. 975, 977, it is stated that: "'Where the very doing of the act charged is in issue and is to be evidenced, one of the essential facts admissible is the person's plan or design to do the act. This plan or design itself may be evidenced by his conduct, and such conduct may consist of other similar acts [including representations] so connected as to indicate a common purpose including in its scope the act charged.'"

[2] We are also of the opinion that much of the evidence here complained of was admissible as tending to show that defendant had the means at hand to commit the crime of which he stands convicted. *People v. Bonner*, 5 Cal.App.2d 623, 627, 43 P.2d 343; *People v. Radovich*, 122 Cal. App. 176, 180, 9 P.2d 542.

The judgment and order are, and each is, affirmed.

We concur: HOUSER, J.; SHENK, J.; EDMONDS, J.; LANGDON, J.; CURTIS, J.



10 Cal.2d 610

PEOPLE v. WELLS.

Cr. 4140.

Supreme Court of California.

Feb. 4, 1938.

As Modified Feb. 17, 1938.

I. Homicide ☞ 146, 254

Where a killing is proved to have been committed by defendant, and nothing further is shown, the presumption is that the killing was malicious and an act of murder, but the verdict should be murder of the second degree and not murder of the first degree. Pen.Code, §§ 187-189.

2. Homicide ☞ 11

Wherever it is established that with malice aforethought a human being has been unlawfully deprived of his life, the crime of "murder" has been committed, and the necessary element of malice is manifested when it appears that the killing was the result

of a deliberate intention unlawfully to take away the life of a fellow creature. Pen. Code, §§ 187-189.

[Ed. Note.—For other definitions of "Murder," see Words & Phrases.]

3. Homicide ⚡146

Proof of a homicide alone establishes a crime, with its necessary ingredient of malice, and immediately the burden is transferred to defendant of proving circumstances in mitigation to lessen the degree of the crime, or in justification or excuse showing that no crime has been committed. Pen. Code, §§ 187, 1105.

4. Homicide ⚡253(1)

Evidence held sufficient to sustain deduction that defendant, who killed deceased with shotgun, was actuated by malice, so as to be guilty of first degree murder. Pen. Code, §§ 187-189, 1105.

5. Criminal law ⚡557

Where facts are presented by prosecution in murder prosecution, which tend to show circumstances of mitigation, defendant, to be entitled to benefit by them, is not required to again place the same facts in evidence. Pen. Code, §§ 187-189, 1105.

6. Homicide ⚡241

That deceased, after a quarrel with defendant, for fear that defendant would shoot him with rifle, unlawfully entered defendant's home, assaulted him, took rifle from his possession, and subsequently refused to return it, did not constitute "circumstances of mitigation" or facts which would conclusively justify or excuse the killing of deceased. Pen. Code, §§ 187-189, 1105.

[Ed. Note.—For other definitions of "Mitigating Circumstances," see Words & Phrases.]

7. Homicide ⚡23(2)

In the absence in the mind of defendant of deliberate and clear intent to take life, or in absence of pre-existing reflection or deliberate premeditation to do so, homicide may be reduced to murder of the second degree. Pen. Code, § 189.

8. Homicide ⚡40

With respect to whether crime was that of "manslaughter" only, legal designation of offense depends largely, if not entirely, on reasonable and justifiable state of mind that was present in offender with reference to his act, either at instant when it was committed, or so shortly before that time

that reason has not had time to return. Pen. Code, § 192.

[Ed. Note.—For other definitions of "Manslaughter," see Words & Phrases.]

9. Homicide ⚡254

For offense to constitute "murder of the second degree," it should appear with reasonable certainty that immediately preceding execution of fatal act, killer had not formed a deliberate intent to take life of person whom he thereafter killed, or that such act was not the result of pre-existing reflection or deliberate premeditation. Pen. Code, § 189.

[Ed. Note.—For other definitions of "Murder in Second Degree," see Words & Phrases.]

10. Homicide ⚡282

In murder prosecution, wherein alleged circumstances of mitigation had been placed in evidence by the defendant and by the prosecution, the jury had the duty to weigh such evidence and thereupon to determine what credit, if any, it deserved, and thereupon to accord to it the weight to which it was entitled. Pen. Code, §§ 189, 1105.

11. Homicide ⚡282

Where jury in murder prosecution concludes that circumstances of mitigation either have not been satisfactorily established by credible evidence, or that even if isolated respective facts should have been satisfactorily established, their combined weight has failed to prove an ultimate fact which amounts to legal mitigation of the offense, as a matter of additional prerogative, the jury has right to reject the whole of such evidence and thereupon revert to respective remaining questions, if any, which may relate to the two degrees of murder, together with incidental question of recommendation of punishment should first degree murder be the verdict. Pen. Code, §§ 187-189, 1105.

12. Homicide ⚡282

In reaching a conclusion in murder prosecution whether circumstances of mitigation had been proved to have existed at the time of homicide, or whether the killing was the willful, deliberate, and premeditated act of the defendant, jury should be guided by rules relating to other defenses generally. Pen. Code, §§ 187-189, 1105.

13. Criminal law ⚡549

The weight and sufficiency of evidence in homicide cases are to be determined in accordance with rules established for the

governance of those matters in legal proceedings generally.

14. Homicide $\hookrightarrow$ 144

The general rules of evidence respecting the burden and quantum of proof apply to prosecutions for homicide as well as all criminal proceedings.

15. Criminal law $\hookrightarrow$ 561(2)

In murder prosecution, any fact necessary to defense confined to original transaction on which charge is founded, only needs to be established sufficiently to create a reasonable doubt of defendant's guilt when taken into consideration with all evidence in the case.

16. Homicide $\hookrightarrow$ 241

Though burden of showing circumstances under which homicide is mitigated, justified or excused, devolves on defendant, he is only bound to produce such evidence as will create in minds of jury a reasonable doubt of his guilt, and not to establish circumstances by preponderance of evidence. Pen.Code, § 1105.

17. Homicide $\hookrightarrow$ 282

The jury has power to give such weight as it deems proper to all circumstances surrounding the commission of a homicide, in determining to what extent they operate as mitigating circumstances in the killing. Pen. Code, § 1105.

18. Homicide $\hookrightarrow$ 282

The jury is to say whether evidence is sufficient to lead them to believe, or to entertain a reasonable doubt whether killing was committed under heat of passion. Pen. Code, § 192.

19. Homicide $\hookrightarrow$ 39

To constitute "heat of passion" which will make a homicide manslaughter, there must be a considerable provocation, such at least as would stir the resentment of a reasonable man. Pen.Code, § 192.

[Ed. Note.—For other definitions of "Heat of Passion," see Words & Phrases.]

20. Homicide $\hookrightarrow$ 43

A provocation of slight and trifling character, such as words of reproach, however grievous they may be, or gestures, or an assault or even a blow, is not sufficient to arouse, in a reasonable man, such passion as reduces an unlawful killing with a deadly weapon to manslaughter. Pen. Code, § 192.

21. Homicide $\hookrightarrow$ 309(1)

In murder prosecution, giving of instruction, that there "may be no appreciable space of time between the intention to kill and the act of killing—they may be as instantaneous as successive thoughts of the mind," was not error. Pen.Code, § 188.

22. Homicide $\hookrightarrow$ 347

Where the evidence shows that defendant is not guilty of degree of homicide of which he was convicted, the Supreme Court should modify the judgment by reducing the crime to lesser degree. Pen.Code, § 1181, as amended by St.1933, p. 1341.

23. Homicide $\hookrightarrow$ 347

In first degree murder cases, authority conferred by statute to modify judgment by reducing crime to lesser degree, where evidence warrants, should be exercised only where evidence clearly is insufficient to show crime in greater degree. Pen.Code, § 1181, as amended by St.1933, p. 1341.

24. Homicide $\hookrightarrow$ 347

"Doubt" in mind of reviewing tribunal as to sufficiency of evidence concerning homicide to justify verdict as to degree of crime, if sufficient to require reduction of degree, should be not merely fanciful or imaginary, but should be reasonable, real, and substantial. Pen.Code, § 1181, as amended by St. 1933, p. 1341.

[Ed. Note.—For other definitions of "Doubt," see Words & Phrases.]

25. Homicide $\hookrightarrow$ 39

As respects reduction of an unlawful killing to voluntary manslaughter because of the fact that it was committed during a sudden quarrel or in heat of passion, the court recognizes that a great difference might exist between two individuals with respect to their temperamental characteristics. Pen. Code, § 192.

26. Homicide $\hookrightarrow$ 282

Whether wrong which defendant had received at hands of deceased, and deceased's conduct were of that gravity and importance that as applied to a reasonable man, situated as the defendant, it reasonably might be anticipated that it would create or produce in his mind a heat of passion sufficient in intensity to connote existence of ultimate fact or condition of circumstances of mitigation of homicide, at least primarily, and in the first instance, was for jury to determine. Pen.Code, § 192.

27. Homicide

In murder prosecution, evidence concerning circumstances of mitigation was not sufficient to produce a reasonable doubt in the Supreme Court's mind that defendant was not guilty of first degree murder as found by jury, so as to require the Supreme Court to reduce degree of crime to second degree murder or manslaughter, as provided by statute. Pen.Code, § 1181, as amended by St.1933, p. 1341.

In Bank.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Harrison Wells was convicted of murder in the first degree, and he appeals. .

Judgment affirmed.

Wm. MacMillan, of Quincy, for appellant.

M. C. Kerr, Dist. Atty. of Plumas County, of Quincy, U. S. Webb, Atty. Gen., and Albert F. Zangerle, Deputy Atty. Gen., for the People.

HOUSER, Justice.

Although not in complete harmony with the testimony that was given by each of the several "eyewitnesses" to the important incidents which preceded and led to the death of one Price at the hands of defendant, an examination of the transcript of the evidence that was adduced on the trial of the action warrants the conclusion that the jury was justified in its implied belief that the following facts had been established, to wit:

So-called "Negro Quarters" are situated in a "clearing" that lies about three-fourths of a mile from the town of Quincy. Apparently the "quarters" consist of two rows of small houses or cabins, in size about fifteen by twenty feet, one row being opposite the other. No. 13, of one of such rows, was occupied by defendant and his wife. A man named Bullock, with his wife, lived in No. 11, which was separated from No. 13 by a distance of about sixty-eight and one-half feet, within which intervening space one other cabin, No. 12, was located. At approximately 7:30 o'clock p. m. on a day in the latter part of June, while it was "first dusk," at a point near the rear of Bullock's cabin (No. 11), defendant accosted Price in a friendly manner and then and there in the presence of Bullock asked Price to repay to defendant the sum of \$1 which

he asserted that Price owed to him. To that suggestion, Price responded that theretofore he had paid that amount to defendant and urged defendant to go with him to see a Mrs. Smith, by whom Price declared that he could "prove" the correctness of that statement. Defendant declined and refused to be thus convinced of his asserted error with reference to his claim on Price. Although aside from the fact that each told the other that he was "crazy," neither defendant nor Price "spoke a cross word." Immediately following that "quarrel" defendant went to his cabin (No. 13) and Price accompanied Bullock to the front of the cabin that was occupied by the latter (No. 11), where they found Mrs. Bullock seated upon a bench and upon which both Price and Bullock also thereupon sat. Within two or three minutes (or possibly three or four minutes) next ensuing, Price arose and went to one corner of the cabin that was occupied by defendant, where in a listening attitude he remained for a space of three or four minutes; thereupon he entered defendant's cabin. A few minutes later, upon emerging therefrom he carried an unloaded rifle that was the property of defendant. Thereupon he returned to the seat that theretofore had been occupied by him on the bench that was located in front of Bullock's cabin. At that time and place Bullock, his wife and another woman (Price's housekeeper) were present. Within "quite a few minutes" thereafter, defendant's wife joined those who were thus assembled and then and there asked Price to give to her not only the dollar which defendant had asserted that Price owed to him, but also defendant's rifle which Price had retained in his possession. To that request Price replied, "I don't owe Wells (defendant) no dollar; I paid the dollar. I ain't going to give you the gun; I will keep the gun." And as further was stated by the witness who gave that testimony, "While she was prevailing with Price for the gun Mr. Wells (defendant) come out and yelled 'Look out!' The gun (in the hands of defendant) went off when I got off the bench. * * * By the time I got three or four feet from the back end of the house he made the second shot. * * * By the time she (Bullock's wife) got in (the rear door of the cabin) and I fastened the door the third shot went off."

With reference to the circumstances which resulted in the fact that Price had possession of a rifle that was the property of defendant, Price's housekeeper testified

in substance that after Price had left the front of Bullock's cabin, she joined Price and as they were about to pass in front of that cabin "they" saw defendant inside his cabin with the rifle in his hand, apparently on his way through the front door entrance of his cabin to the outside thereof; that thereupon Price said "he couldn't out run that" and went into defendant's cabin, "grabbed hold" of the rifle that defendant held in his hands, and after a struggle with defendant, succeeded in wresting it from his possession; that in the course of that struggle, Price said to defendant "Why do you want to hurt me. I don't want to hurt you"; that thereupon Price "come on out and told Wells 'Why act like that?'" and that after Price had gone back to the front of Bullock's cabin, in substance he said to Mrs. Bullock, "Don't run home, girl. I am not going to hurt anybody." He said, "I am not going to hurt nobody and I don't want nobody to hurt me." And that in answer to the request made of Price by Mrs. Wells two or three minutes afterward, that he give defendant's rifle to her, Price said, "I will not give it to you; I want no trouble; I don't want to hurt Wells. I don't want Wells to hurt me; I am not going to hurt him."

Defendant was not sworn as a witness; but in his behalf, with reference to the incident in which it appeared that Price wrested the rifle from defendant, the wife of defendant testified:

"When Wells walked in (after the quarrel) Stella Vaughn (Price's housekeeper) and myself was sitting in the kitchen talking and he went on through to the bedroom; so after he was in there awhile I got up and went in—while talking to Estella. When I was in there talking to Wells Stella says 'Net, I'm going, I will be back,' and shortly after that Price walked in the back door. Someone knocked at the back door; I said 'who is that.' He didn't say anything, so Wells said 'don't come in here Price, don't come in here.' Then Price went on around to the front door and I heard him and then I pulled the door open and I said 'Price, don't come in here, don't come in here Price.' Wells said 'don't come in here.' When he got to the middle door to come into the bedroom Wells said 'didn't I tell you not to come in here.' When he did that he jumped and Wells got the gun. Shoved Wells on the bed and they were fussing in there about five minutes before Stella came in. When he taken the gun he walked out

and Stella walked out behind him and I was behind Estella. I walked out and told Wells 'I will get the gun' and while I went out to get the gun and while talking to Price to give me the gun, while standing in front of him, and Price said 'No, Home girl, I will not give it to you.' I said 'give me the gun'; he said: 'I will not give it to you.' I said 'don't you owe Wells a dollar'; he says 'no,' and at that time Wells said 'look out.'

"Q. Then there was a shot fired? A. Then there was a shot fired."

It also appears that after defendant had fired the first shot from his shotgun, and all the persons, including Price, that immediately theretofore had been in front of Bullock's cabin, in an attempt to escape injury, had run each in a direction different from that which was taken by either of the others, defendant followed Price and fired two additional shots from the shotgun. Within a few minutes thereafter Price was found dead, with defendant's unloaded rifle clutched in his right hand. It is unquestioned that his death was the result of his having been shot by defendant.

On such evidence, without making any recommendation regarding the punishment that should be inflicted upon the defendant, the jury returned its verdict of "guilty of murder in the first degree." It is from the ensuing judgment, as well as from an order by which defendant's motion for a new trial was denied, also from an order by which was denied defendant's motion that the judgment be modified by reducing the degree of the crime either to murder in the second degree, or to the crime of manslaughter, that the instant appeal has been taken.

[1] Citing *People v. Howard*, 211 Cal. 322, 328, 329, 295 P. 333, 336, 71 A.L.R. 1385, as authority, appellant contends that although it be conceded that defendant killed Price, nevertheless, "that no express malice aforethought was shown." Consideration of the text of the authority to which appellant has referred discloses the fact that it consists of the substance of sections 187, 188, and 189 of the Penal Code, together with a condensation of respective rulings that heretofore have been made either by this court or by the District Court of Appeal in each of several cases, to wit, *People v. Bellon*, 180 Cal. 706, 182 P. 420, *People v. Knapp*, 71 Cal. 1, 11 P. 793, and *People v. Ford*, 85 Cal.App. 258, 258 P. 1111, which, as far as herein is pertinent,

are to the effect that, "When the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious and an act of murder; but in such a case the verdict should be murder of the second degree, and not murder of the first degree."

[2,3] By the terms of the several statutes to which reference hereinbefore has been had, it is obvious that whenever it has been established that with malice aforethought a human being has been unlawfully deprived of his life, the crime of murder has been committed; and that the necessary element of malice "is manifested" when it appears that the killing was the result of "a deliberate intention unlawfully to take away the life of a fellow-creature." And in substance the pertinent provisions of section 1105, Penal Code, are to the effect that when the commission of a homicide has been established, "the burden of proving circumstances of mitigation, or that justify or excuse it," devolves upon the defendant. Or as is amplified in the case of *People v. Jones*, 160 Cal. 358, 370, 117 P. 176, 181, "In the case of murder, the law has made provision peculiar to the crime. To the crime of murder, malice is an essential. (Pen.Code. §§ 187, 188); but by section 1105 of the Penal Code, when the homicide by the defendant has been proved, the murder is established, and, of course, to establish murder the malice must be established. We have thus, in our law, the peculiar situation touching murder that proof of the homicide alone establishes the crime, with its necessary ingredient of malice, and immediately the burden is transferred to the defendant of proving circumstances in mitigation to lessen the degree of the crime, or in justification or excuse show that no crime has been committed. Thus the effect of section 187 and of section 1105 of the Penal Code, construed together, is as though the law had expressly declared that, while murder is the unlawful killing of a human being with malice aforethought, every killing is murder, unless the defendant proves the contrary. * * * In *New York* * * * it is held that there is never a presumption of malice in the case of a homicide, and that an actual intent to kill must be shown affirmatively; whereas, by virtue of section 1105 of our Code, the existence of malice is presumptively proved by proof of the killing."

[4] In each of the authorities to which reference hereinbefore has been had, it

may be noted that the declaration by the court to the effect that in the circumstances therein assumed to exist, the crime would amount to second degree murder only, is dependent upon the fact that an unlawful killing and "nothing further" has been shown. In the instant case, much more than the isolated fact that Price was unlawfully killed by defendant was thoroughly established; and considering the law, together with the evidence that hereinbefore has been summarized, it would seem clear that the conclusion of express malice of defendant was fairly deducible.

[5-9] As has been suggested by appellant, it may be conceded that if facts were presented by the prosecution which tended to show "circumstances of mitigation," section 1105, Pen.Code, in order that defendant might have become entitled to benefit by them, he was not required to again place the same facts in evidence. However, the assumed facts, that a few minutes preceding the instant when defendant shot Price, the two men not only had "quarreled" one with the other, but also that shortly thereafter, with the apparent belief on the part of Price that with the use of a rifle defendant intended to commit some sort of a violent act upon the person of Price, the latter thereupon unlawfully had entered the home of defendant, had assaulted him, besides which had wrested the rifle from his possession, and subsequently had refused to return defendant's property to him, were not necessarily either "circumstances of mitigation" or facts which would conclusively "justify or excuse" the commission of the offense. One of the provisions of section 192 of the Penal Code is to the effect that if "upon a sudden quarrel or heat of passion" a human being should be unlawfully killed, "without malice," the offense thus committed will be manslaughter; otherwise, in the absence in the mind of the defendant of a deliberate and clear intent to take life, or that which has been termed as "pre-existing reflection" or "deliberate premeditation" to do so, the homicide that may be committed by him may be reduced to murder of the second degree. In other words, with respect to whether the crime was that of manslaughter only, the legal designation of the offense depends largely, if not entirely, upon the reasonable and justifiable state of mind that was present in the offender with reference to his act, either at the instant when it was committed, or so shortly before that time that reason

shall not have had time "to resume its empire"; that is to say, that before the offense properly may be classed as manslaughter, it should appear that after the "heat of passion" was reasonably and justifiedly engendered, "hot blood had not had time to cool" before the fatal act was committed. Likewise, in order that a conclusion that the offense constituted a murder of the second degree might be sustainable, it should appear with reasonable certainty that immediately preceding the execution of his fatal act the killer had not formed a deliberate intent to take the life of the person whom he thereafter killed, or that such act was not the result of "pre-existing reflection" or "deliberate premeditation."

An examination of the instructions that were given by the trial judge to the jury discloses the fact that the so-called "stock instruction" that since the decision was rendered by this court in the case of *People v. Iams*, 57 Cal. 115, customarily has been given in murder cases in this state, was very closely, if not literally, followed. A part of the instruction that was given herein was as follows:

"Murder is defined to be the unlawful killing of a human being with malice aforethought. The word malice imports a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or by presumption of law. Malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

"All murder which is perpetrated by means of poison, lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, is murder of the first degree, and all other kinds of murder are of the second degree.

"The difference between murder of the first degree and murder of the second degree is: That in murder of the first degree the killing must be deliberate and premeditated, while in murder of the second degree the killing is not deliberate and premeditated. In the one case there is a deliberate, premeditated, preconceived design, though it may have been formed in the mind immediately before the mortal wound was given to take life. In the other case there is no deliberate, premeditated, preconceived design to kill. In both, however, the

killing must have been unlawful and accomplished with malice.

"There may be no appreciable space of time between the intention to kill and the act of killing—they may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by, and the result of a concurrence of will, deliberation, and premeditation on the part of the slayer; and if such is the case the killing is murder of the first degree, no matter how rapidly these acts of the mind succeed each other or how quickly they may be followed by the act of killing.

"Under the Information in this case the defendant may, if the evidence warrants it, be convicted of manslaughter, which is defined by our statute to be the unlawful killing of a human being without malice. It is of two kinds: first, voluntary, upon a sudden quarrel or heat of passion; and, second—involuntary, in the commission of an unlawful act which might produce death in an unlawful manner and without due caution and circumspection.

"To reduce a felonious homicide from the grade of murder to that of manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of such a character as would be naturally calculated to excite and arouse the passions, and it must appear that the party acted upon the smart of sudden passion and resentment.

"If, however, the provocation was of a slight and trifling character, of such a nature as would not be calculated to arouse passion, or if sufficient time had elapsed between the provocation and the fatal shot for passion to subside and reason to resume its empire, the offense will not be mitigated, but the slayer will be guilty of murder.

* * *

"* * * In this case if you find the defendant killed the deceased, then the burden of proving circumstances of mitigation or that justifies or excuses the homicide devolves upon the defendant, unless the proof upon the part of the prosecution tends to show that the crime committed only amounts to manslaughter or that the defendant was justified or excusable.

* * *

Although no question is raised by appellant either as to the correctness or to the adequacy of other instructions that were given to the jury, the record herein fails to disclose that as to each of the several issues

that were involved in the action, the jury was not fairly instructed.

[10-20] As hereinbefore has been indicated in the quotation from the case of *People v. Jones*, 160 Cal. 358, 370, 117 P. 176, the fact that an unlawful killing by the defendant may have been established, and in that connection that assumed "circumstances of mitigation" have been placed in evidence either by the prosecution or by the defendant, as far as the jury is concerned, they are not necessarily conclusive either as to the proof of the several items of evidence by which such "circumstances of mitigation" have been sought to be established, or as to the effect of such items taken either separately or as a whole. The jury has the right, and it is its duty, to weigh such evidence and thereupon to determine what credit, if any, it deserves, and thereupon to accord to it the weight to which it is entitled. And in so doing, should the jury conclude that the "circumstances of mitigation" either have not been satisfactorily established by credible evidence, or that even if isolated respective facts should have been satisfactorily established, their combined weight have failed to prove an ultimate fact which amounts to legal mitigation of the offense—as a matter of additional prerogative, the jury has the right to reject the whole of such evidence and thereupon and thereafter to revert to the respective remaining questions, if any, which may relate to the two degrees of murder, together with the incidental question of recommendation of punishment, should first degree murder be the verdict. In other words, an issue either as to whether "circumstances of mitigation" have been proved to have existed at the time when the offense was committed, or whether in the language of section 189, Penal Code, the killing was the "willful, deliberate, and premeditated" act of the defendant, depends for its determination primarily upon the evidence that may have been presented in its favor, as well as that which may have been received against it; and in reaching a conclusion with reference to the matter, in the consideration of all the evidence, the jury should be guided by rules that relate to other "defenses" generally. In that connection the following excerpts which have been taken from respective texts and adjudicated cases illustrate not only such general rule, but also the rule that governs the degree of "proof" that is required to establish either "circumstances of mitigation" of the offense, or these which either justify or excuse it;

that is to say: It is stated in 13 Ruling Case Law, page 909, that, "The weight and sufficiency of evidence in homicide cases are to be determined in accordance with the rules established for the governance of these matters in legal proceedings generally" and on page 908 that: "The general rules of evidence respecting the burden and quantum of proof apply to prosecutions for homicide as well as all criminal proceedings." See, also, 8 Cal.Jur., p. 187. In the latter authority it is said: "There is a marked difference in the degree of proof required to establish any fact against the defendant, and that sufficient to establish any fact in his favor. Since the prosecution is required to prove the guilt of a defendant beyond a reasonable doubt, it follows that any fact necessary to the defense confined to the original transaction on which the charge is founded only needs to be established sufficiently to create a reasonable doubt of the defendant's guilt when taken into consideration with all the evidence in the case. To require a defendant to establish his defense by a preponderance of evidence would manifestly shift the burden of proof and deprive him of the benefit of the doctrine of reasonable doubt." Also in volume 13, California Jurisprudence, page 737, the following statement is found: "While the burden of showing the circumstances under which the homicide is mitigated, justified or excused, devolves upon the defendant, he is only bound under this rule to produce such evidence as will create in the minds of the jury a reasonable doubt of his guilt of the offense charged. He is not required to establish such circumstances by a preponderance of the evidence." In the case of *People v. Roe*, 189 Cal. 548, 550, 564, 209 P. 560, 567, it is said: "While section 1105, Penal Code, casts upon a defendant the burden of proving circumstances that justify or excuse the commission of a homicide, it does not mean that he must prove such circumstances by a preponderance of the evidence. On the contrary, while the burden of showing the circumstances under which the act is justified devolves upon a defendant, he is only bound under this rule to produce such evidence as will create in the minds of the jury a reasonable doubt of his guilt of the offense charged." And in *People v. Post*, 208 Cal. 433, 281 P. 618, 620, it was held that the giving of an instruction which required the defendant to produce in his defense evidence of greater weight than would be sufficient to create in the minds of the jurors

a reasonable doubt as to his guilt, was erroneous and declared to be "so far prejudicial as to take the case beyond the curative provisions of section 4½ of article 6 of the Constitution." And to the same effect is the language found in the case of *People v. Rodriguez*, 182 Cal. 197, 187 P. 423, wherein it is said: "The killing by the defendant being shown, the burden was upon him to explain how it happened that he took a human life and to show any circumstances of mitigation, excuse, or justification for his act that might exist. Unless he met this burden to the extent of raising a reasonable doubt as to his being guilty of murder as distinguished from manslaughter or justifiable homicide, the verdict was justified from the fact alone that he had taken human life." See, also, 13 Cal. Jur. p. 735. In 6 California Jurisprudence, 10 Year Supplement, page 325, it is said: "It is within the power of the jury to give such weight as it deems proper to all the circumstances surrounding the commission of a homicide in determining to what extent if at all they operate as mitigating circumstances in the killing. *People v. Gebbia*, 138 Cal. App. 94, 31 P.2d 822." Also in 13 California Jurisprudence, page 611, it is said: "It is left to the jury to say whether the evidence is sufficient to lead them to believe, or to entertain a reasonable doubt whether the offense was committed under heat of passion. * * * While no particular cause for such heat of passion is expressly prescribed by law. * * * There must be 'considerable' provocation, such at least as would stir the resentment of a reasonable man. A provocation of slight and trifling character, such as words of reproach, however grievous they may be, or gestures, or an assault, or even a blow, is not recognized as sufficient to arouse, in a reasonable man, such passion as reduces an unlawful killing with a deadly weapon to manslaughter * * *"; and on page 612, "The sufficiency of provocation to reduce a homicide from murder to manslaughter, and whether defendant did in fact act under such provocation, are questions of fact for the jury." To the same effect is language found in 13 Ruling Case Law, page 910, as follows: "Sound policy declares that the issue of guilt or innocence is for the jury's determination, and that appellate courts should interfere with judgments of conviction only in exceptional cases."

And so in the instant matter: For example, had the jury concluded that the effect of the "quarrel" which took place be-

tween defendant and Price, together with that which the jury believed was the truth with reference to the incident whereby it appeared that defendant's rifle was wrested from his possession by Price, and the retention of the rifle by him after he was requested to return it to defendant, were of that gravity which, in the mind of an ordinarily reasonable person would have been sufficient to create therein such resentment or anger that it would amount to a "heat of passion" to the extent and duration that immediately and continuously thereafter up to the instant when the fatal act was committed by him, in effect he was mentally irresponsible—the logical result would have been that "circumstances of mitigation" for the commission of the offense properly would have been the implied finding of fact by the jury. Likewise, with respect to the issue of whether the offense was that of murder in the second degree: It was the exclusive province of the jury to determine from the evidence whether the killing was the "wilful, deliberate and premeditated" act of defendant. In that connection, in the case of *People v. Mahatch*, 148 Cal. 200, 203, 82 P. 779, 780, in part it was said: "The jury, having found that the only extenuating circumstance which he interposed had no existence in fact, and no claim of any circumstances of mitigation, justification, or excuse for the killing being advanced, had a right to infer, from the character of the weapon used, the nature of the wound inflicted, and the acts and conduct of the accused, the existence of a deliberate purpose on his part to kill the deceased when the fatal blow was struck, and, so inferring, were warranted in returning a verdict therefrom for murder in the first degree. This is the general, it may be said the universal, rule. If a different one prevailed, secret murders could rarely be punished by the infliction of the highest penalty. It is exclusively the province of a jury to determine the degree of crime when there is any evidence in the case which will support the determination. We are satisfied that in the case at bar there was sufficient evidence to warrant the jury, within the rule we have stated, in inferring the existence of a deliberate intent to kill. They so found and awarded the highest penalty, and their finding was approved by the trial judge on the motion for a new trial. This is conclusive upon the subject and upon us, as we can only disturb a finding when we can say, as matter of law, that there was no evidence to support it." See, also, *People*

v. Rico, 180 Cal. 385, 181 P. 663; *People v. McNeer*, 14 Cal.App.2d 22, 25, 57 P.2d 1018; *People v. Shaver*, 7 Cal.2d 586, 61 P.2d 1170; *People v. Machuca*, 158 Cal. 62, 109 P. 886; 13 Cal.Jur., p. 595, and cases there cited.

Considering the verdict that was returned by the jury, to wit, "guilty of murder in the first degree" (without recommendation), and particularly in view of the time that elapsed after the "quarrel" between Price and defendant had taken place, together with that which ensued after the incident that related to the seizure and the retention by Price of defendant's rifle—all of which preceded the instant when the first shot was fired by defendant at Price—it becomes apparent that the jury was of the opinion and thereupon reached the conclusion not only that during the interval which succeeded those two episodes before the fatal shot was fired, had "hot blood had sufficient time to cool," but, also, that following a time when presumably "reason had resumed its empire" the crime was committed "upon pre-existing reflection" and was the "wilful, deliberate and premeditated" act of defendant.

In that regard, the jury was instructed that "There may be no appreciable space of time between the intention to kill and the act of killing—they may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by, and the result of a concurrence of will, deliberation, and premeditation on the part of the slayer; and if such is the case the killing is murder in the first degree, no matter how rapidly these acts of the mind succeed each other or how quickly they may be followed by the act of killing."

[21] Although with reference to the formation of "a deliberate intention unlawfully to take away the life of a fellow-creature," section 188, Pen.Code, it may seem somewhat questionable to judicially declare that no appreciable time is required for "pre-existing reflection, deliberation and premeditation," but that to the contrary, such "pre-existing reflection, deliberation and premeditation" may be "as instantaneous as successive thoughts of the mind," nevertheless, from "time immemorial," and especially since the time when it was so positively asserted in the *Iams Case*, 57 Cal. 115, the rule as announced has been fixed and firmly embedded within the foundations of statutory construction as applied to pertinent penal statutes of this state. Neither

from a consideration of abstract justice, of humanity, nor even of an appreciation of the capacity of the normal human mind, is the possibility of the inaccuracy of that rule here called in question; and at least until it be directly and successfully challenged either through or by judicial or legislative channels, it must remain a basic guide for the determination of future questions that may relate to the degree that should be attributed to the crime of murder, defined by the statute as "the unlawful killing of a human being, with malice aforethought." Section 187, Pen.Code.

Notwithstanding the well-established rule of law as is announced in *People v. Mahatch*, 148 Cal. 200, 82 P. 779, that "it is exclusively the province of a jury to determine the degree of crime when there is any evidence in the case which will support the determination," in substance appellant urges the point that since the evidence herein shows that defendant was not guilty of the degree of the crime of which he was convicted, not only under the direct provisions of section 1181 of the Penal Code, as amended by St. 1933, p. 1341, but also in accord with the decisions heretofore rendered by this court in the respective cases of *People v. Kelley*, 208 Cal. 387, 281 P. 609, and *People v. Howard*, 211 Cal. 322, 295 P. 333, 71 A.L.R. 1385, the judgment herein should be modified by "reducing the crime" to either murder in the second degree or to that of manslaughter.

[22, 23] In that respect, as far only as the abstract power of the court in proper situations is concerned, there can be no doubt regarding the correctness of the point that is suggested by appellant. However, from a consideration of the cases to which reference has been had, it is apparent that in first degree murder cases the authority conferred by the provisions of the statute should be exercised only where the evidence either clearly is insufficient to show anything other than that the defendant therein unlawfully killed "a human being (presumptively) with malice aforethought," that is wilfully, deliberately and premeditatively, or, possibly, that with respect to whether such a condition in the mind of the defendant existed, as was indirectly suggested in the latter case, when this court entertains "a doubt as to its (the evidence) showing murder of the first degree."

[24-27] As hereinbefore has been indicated, this court is of the opinion that the evidence is legally sufficient to support the

verdict generally that was returned by the jury. With respect to the second proposition, assuming, without here affirming the suggestion that the existence of a doubt in the "mind" of the reviewing tribunal with reference to the insufficiency of the evidence to justify the verdict as to the degree of the crime may constitute a valid reason for an order by which the degree of the crime as expressed in the verdict may be reduced, nevertheless it should be made clear that the "doubt," if any, like that universally required of the jury on the trial of a criminal action, should be not merely fanciful or imaginary, but should be reasonable, real, and substantial. It is a commonly recognized fact that a very great difference may exist between two individuals with respect to their respective temperamental characteristics; that is to say, that that which to one individual may be provocative even to the degree of "a heat of passion," to another may be only a cause for merri-ment. And so with the defendant in the instant action: although he may have been greatly exercised and incensed at the treatment or the assumed wrongs which theretofore he had received at the hands of Price, nevertheless the question as to whether such behavior was of that gravity and importance that, as applied to a reasonable man, situated as was the defendant, it reasonably might be anticipated that it would create or produce in his mind a "heat of passion" sufficient in intensity to connote the existence of the ultimate fact or condition of "circumstances of mitigation," at least primarily, and in the first instance, was for the jury to determine. With that principle noted, although it well may be that one reasonable mind might differ from another with respect to whether the evidence in the instant case presented such a situation that therefrom should follow a conclusion either that the act of defendant was committed by him in the absence of deliberation and pre-meditation with reference thereto, or, that if said act was intentionally committed by defendant, it was done in the "heat of passion"—nevertheless, the question of whether this court has a reasonable "doubt" on the issue of the legal sufficiency of the evidence to warrant the verdict of the jury, must be answered in the negative.

No other issues are presented by appellant's brief. It follows that the judgment, and each of the orders from which defendant has appealed, should be and they are affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; EDMONDS, J.; LANGDON, J.; SHENK, J.



10 Cal.2d 671

**UNION FLOWER MARKET, Limited, v.
SOUTHERN CALIFORNIA FLOWER
MARKET, Inc., et al.**

L. A. 16422.

Supreme Court of California.

Feb. 16, 1938.

1. Appeal and error ⇨635(1)

That answer of defendant was not included in record on appeal filed in Supreme Court, in case wherein judgment was entered for defendants on pleadings, did not require dismissal of appeal, since the sole question was whether the complaint stated a cause of action. Code Civ.Proc. § 670, as amended by St.1933, p. 1883; §§ 950, 953.

2. Appeal and error ⇨635(1)

An appeal will not be dismissed for failure to include in the record on appeal a part of the judgment roll not material to determination of the appeal. Code Civ.Proc. § 670, as amended by St.1933, p. 1883; §§ 950, 953.

3. Appeal and error ⇨518(7), 597(1), 612(2)

As regards whether proper record was presented on appeal from judgment roll, an order granting the defendants' motion for judgment on the pleadings was not part of "judgment roll" and could not be authenticated by clerk or properly included in clerk's transcript, but, where clerk's certificate thereon was followed by certificate of trial judge, the order was authenticated. Code Civ.Proc. § 670, as amended by St.1933, p. 1883; §§ 950, 953.

[Ed. Note.—For other definitions of "Judgment Roll," see Words & Phrases.]

4. Appeal and error ⇨518(7)

Where it appeared affirmatively from judgment that the judgment was entered pursuant to the granting of defendants' motion for judgment on the pleadings, it was unnecessary for minute order granting the

motion to be included in the record on judgment roll appeal. Code Civ.Proc. § 670, as amended by St.1933, p. 1883; §§ 950, 953.

5. Fraud ⚡27

Wholesale florist could not recover from another florist corporation for damages resulting to florist because it gave up lease of its premises in reliance upon promise by the corporation to consolidate with florist, based upon fraud of corporation whose members refused to authorize consolidation, where florist was informed, at time it gave up its lease, that corporation had not secured consent or authorization of its members to effect a consolidation.

6. Fraud ⚡12

A promise made without any intention of performing it constitutes "fraud."

[Ed. Note.—For other definitions of "Fraud," see Words & Phrases.]

7. Fraud ⚡11(I)

A false statement of opinion fraudulently made may form the basis of an action where the party making it possesses superior knowledge or special information regarding the subject-matter of the representation.

8. Fraud ⚡27

The promise of directors of florist corporation, who were also officers of corporation and had large financial interests therein, that they would exert their utmost efforts to secure consent of members of corporation to consolidate with rival wholesale florist corporation, made without intention of performing it and for purpose of destroying the rival, and the false representation that there was no doubt but that the corporation would receive the members of the business rival, constituted actionable fraud by the directors.

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by the Union Flower Market, Limited, against the Southern California Flower Market, Incorporated, and others. From a judgment on the pleadings in favor of the defendants, the plaintiff appeals.

Judgment affirmed as to named defendant, and reversed as to defendants Tomijiro Sato and others. As to the defendants except the Southern California Flower Market, the nonappealable minute order for judgment on the pleadings in so

far as it relates to them will fall with the reversal of the judgment entered thereon.

For prior opinion, see 68 P.2d 1019.

Lorrin Andrews and Fred W. Heath, both of Los Angeles (Montgomery G. Rice, of Los Angeles, of counsel), for appellant.

J. Marion Wright, Biby & Biby, John E. Biby, John Y. Maeno, and Leonard Slosson, all of Los Angeles, for respondents.

SEAWELL, Justice.

[1,2] This is an appeal from a judgment on the pleadings in favor of defendants.

The defendants contend that the appeal should be dismissed or the judgment affirmed for failure of appellant to present a proper record on appeal. Section 950, Code of Civil Procedure, provides that on appeal from a final judgment the appellant must furnish the court with a copy of the judgment roll, certified by the clerk or the attorneys. Section 953, Code Civ. Proc. By section 670, Code of Civil Procedure, as amended by St.1933, p. 1883, it is provided that the judgment roll includes the pleadings. The answer is not included in the record filed in this court in the instant case. But where judgment has been entered for defendants on the pleadings the sole question is whether the complaint states a cause of action. *Hibernia Sav. & L. Soc. v. Thornton*, 117 Cal. 481, 49 P. 573; *Shanley v. American Olive Co.*, 185 Cal. 552, 197 P. 793; *Elmore v. Tingley*, 78 Cal.App. 460, 248 P. 706. The appeal will not be dismissed for failure to include in the record on appeal a part of the judgment roll not material to determination of the appeal. *Paige v. Roeding*, 89 Cal. 69, 26 P. 787.

The judgment for defendants on the pleadings, according to its recitals, was entered upon "the complaint as amended by interlineation." On the complaint as copied in the record herein the interlineations appear as interlineations bearing the initials of the trial judge in the margin. The clerk's certificate, by which the papers constituting the judgment roll or clerk's transcript are authenticated, section 953, Code Civ. Proc., recites that said transcript contains a full, true and correct copy of the complaint and other instruments contained therein "together with the

endorsements on said documents as the same now appear on file and/or of record in this office." The amendments by interlineation are indorsements on the complaint as originally filed.

It is true that in its notice to the clerk to prepare the transcript the plaintiff asked that there be included in the transcript "plaintiff's complaint filed herein on April 23, 1934," without adding the words "as amended by interlineation." But it affirmatively appears from the record that the complaint included therein is the complaint as thus amended upon which judgment was entered.

[3,4] The clerk included in his transcript a copy of the minute order granting the defendants' motion for judgment on the pleadings. This order is not part of the judgment roll as defined by section 670, Code of Civil Procedure, and hence could not be authenticated by the clerk or properly included in the clerk's transcript. *Martin v. Pacific Elec. Co.*, 195 Cal. 544, 234 P. 321; *Toiten v. Barlow*, 165 Cal. 378, 132 P. 749. But since it appears affirmatively from the judgment that said judgment was entered pursuant to the granting of defendants' motion, it is not necessary that the order itself be included in the record on appeal. *Weeks v. Gold Mining Co.*, 73 Cal. 599, 15 P. 302. We conclude that without the minute order plaintiff has presented a sufficient record for determination of the appeal herein as a judgment roll appeal. Furthermore, the clerk's certificate is followed by a certificate of the trial judge, which authenticated the minute order. *Pierce v. Works*, 171 Cal. 684, 154 P. 852; *Lake v. Harris*, 198 Cal. 85, 243 P. 417; *Beck v. Barnes*, 129 Cal.App. 187, 18 P.2d 749.

The defendants in this action are Southern California Flower Market, Inc., a corporation, and four individual defendants who are alleged to be directors and executive officers of defendant corporation and to have a large financial interest therein. Defendant corporation and plaintiff corporation are both engaged in the wholesale florist business in the city of Los Angeles. The wholesale flower market in said city is located on Wall street, between East Seventh and East Eighth streets. Plaintiff alleges that it is necessary that wholesale florists have their stands in this area to enable them to market their flowers.

[5] Plaintiff was a lessee of the premises known as 743 and 745 Wall street. Defendant occupied adjoining premises. The charge of fraud against defendant corporation is that, through its officers and directors, it proposed that plaintiff and defendant consolidate, and falsely and fraudulently represented that it was "fully authorized" to "effect a consolidation" with plaintiff. Under said consolidation members of plaintiff corporation would be received as members of defendant, with full rights and privileges, including stalls for exhibition and sale of flowers. Relying on this representation plaintiff disposed of its leases, vacated the premises, and secured the consent of its members to consolidation. Plaintiff prays for compensatory damages in the sum of \$250,000 and exemplary damages in the sum of \$50,000 alleging that it has been forced to rent an inferior place of business outside the above-described flower market area and thereby has lost a number of its members.

It appears from the complaint, however, that plaintiff knew, by reason of representations alleged in the complaint to have been made to it, that defendant corporation was not "fully authorized" to effect a consolidation. It is alleged that defendant officers and directors promised plaintiff that they "would use and exert their utmost efforts to secure the consent of the members of Southern California Flower Market, Inc. [defendant], to the consolidation." This allegation refers to a consent thereafter to be obtained. It thus appears affirmatively from the complaint that plaintiff corporation was informed that the defendant corporation had not yet secured the consent or authorization of its members to effect a consolidation. The complaint fails to state a cause of action against defendant corporation.

As to the individual defendants a different question is presented. We have referred above to the allegation that defendant officers and directors promised plaintiff that they would use and exert their utmost efforts to secure the consent of the members of defendant to the proposed consolidation. It is alleged that this promise was made by the individual defendants "in their individual capacities," and that it was made without any intention to perform the promise, and for the purpose of destroying plaintiff as a rival in business of defendant. It is also alleged that the individual defendants false-

ly represented that "there could be no doubt but that Southern California Flower Market, Inc., would so receive said members [i. e. of plaintiff]."

After plaintiff, in reliance on said promise and representation, had surrendered its leases and ceased to function as a competitor of defendant corporation, the individual defendants refused to carry out their promises, it is averred. They refused to permit the members of plaintiff to become members of defendant, and "did not use or exert their utmost or any efforts to secure the consent of the members" of defendant to the consolidation, "but on the contrary said defendants urged the members of the said Southern California Flower Market, Inc., not to consent to consolidation of said markets and to refuse membership to the members of Union Flower Market, Ltd. [plaintiff]."

[6] A promise made without any intention of performing it constitutes fraud. Section 1572, subdivision 4, Civ.Code; *Lawrence v. Gayetty*, 78 Cal. 126, 20 P. 382, 12 Am.St.Rep. 29; *Lundblade v. Boyes*, 101 Cal.App. 741, 282 P. 399; *Snyder v. City Bond & Finance Co.*, 106 Cal. App. 745, 289 P. 859; *Benson v. Hamilton*, 126 Cal.App. 331, 14 P.2d 876; *Wilson v. Rigali*, 138 Cal.App. 760, 33 P.2d 455.

[7,8] The allegations as to the promise of the individual defendants herein to exert their utmost efforts to secure consent of the members of defendant corporation to a consolidation, made without any intention of performing it and for the malicious purpose of destroying plaintiff as a business rival, coupled with their alleged false representation that there "could be no doubt but that Southern California Flower Market, Inc., would so receive said members [i. e. of plaintiff]," constitutes an averment of actionable fraud on the part of the individual defendants. It is true that this representation was in a sense a statement of opinion. But a false statement of opinion fraudulently made may form the basis of an action, as where the party making it possesses superior knowledge or special information regarding the subject-matter of the representation. *Russell v. Roscoe*, 106 Cal.App. 293, 289 P. 185; *Sears v. Myerson*, 106 Cal. App. 220, 289 P. 173; *Eade v. Reich*, 120 Cal.App. 32, 7 P.2d 1043; *Antognini v. Grandi Co.*, 89 Cal.App. 628, 645, 265 P. 378. In the instant case the individual defendants, as directors, officers, and hold-

ers of a large financial interest in the corporation, had superior means of ascertaining and influencing the views of the members of the corporation concerning a consolidation.

The judgment on the pleadings in favor of defendants is affirmed as to defendant corporation. As to the individual defendants it is reversed. As to said individual defendants, the nonappealable minute order for judgment on the pleadings in so far as it relates to them will fall with the reversal of the judgment entered thereon.

We concur: WASTE, C. J.; HOUSER, J.; SHENK, J.; LANGDON, J.; EDMONDS, J.; CURTIS, J.



10 Cal.2d 701

In re FLATAU'S ESTATE.

LEVY v. FLATAU et al.

L. A. 15926.

Supreme Court of California.

Feb. 17, 1938.

Rehearing Denied March 17, 1938.

1. Wills ⇨324(2, 3)

Evidence in will contest *held* insufficient to take to jury questions of testator's incompetency and undue influence over him by legatee.

2. Wills ⇨52(1)

There is strong presumption of testator's competency in will contest.

3. Evidence ⇨474(4), 537

Testimony of registered nurse attending testator, as to his testamentary capacity at time of executing will, was properly excluded in contest thereof, where no attempt was made to qualify witness as expert and she was not intimate acquaintance qualified to give nonexpert opinion on sanity.

In Bank.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Proceeding by Jacob L. Flatau and others for probate of the will of Edward S. Flatau, deceased, contested by Gladys Flatau Levy. From an order directing a verdict for proponents and admitting the will to probate, contestant appeals.

Affirmed.

For prior opinion, see Cal.App., 69 P.2d 209.

Gibson, Dunn & Crutcher and Henry F. Prince, all of Los Angeles (Robert F. Schwarz, of Los Angeles, of counsel), for appellant.

Morin, Newell, Brown & Hamill and Stanley K. Brown, all of Pasadena, for respondent Celia Flatau.

Alfred J. Smallberg, of Los Angeles, for other respondents.

LANGDON, Justice.

This is an appeal from an order of the trial court in a will contest directing a verdict for respondent, proponent of the will. The contest was filed by an adopted daughter of decedent, and was based upon allegations of incompetency and undue influence.

In 1897, while living in Ohio, decedent Edward S. Flatau and his wife, respondent Celia Flatau, adopted contestant Gladys Flatau, who was then three years old. In 1914 she married Lionel Levy in Toledo, Ohio. Having accumulated sufficient funds, decedent retired from business in about 1925, when he came to California with his wife. He continued thereafter to look after his investments and engaged in other normal activities. In 1933 he took a trip to Ohio, and in Toledo engaged his attorneys to draw a will for him, in which his adopted daughter was not mentioned. In September, 1935, decedent consulted with respondent Jacob Flatau, his brother, with reference to the drawing of a new will, and the latter took decedent's old will to his attorney, who prepared several drafts during the next few months. On December 22, 1935, decedent was taken to the hospital, suffering from a leg ailment involving the possible necessity of amputation. The brother was called to the hospital, and saw decedent that evening and the following day. On the afternoon of December 24, the final draft of the will was read to decedent in the presence of two doctors, and after approval, was subscribed by them and by an attending nurse.

Shortly thereafter decedent went to the operating room. He was unable to recover from the operation and died five days later.

The will named Jacob Flatau, the brother, executor to serve with bond, and gave him an undivided one-sixth interest in fee of one-half of decedent's real property in Ohio, subject to a prior life estate. The rest of the estate went to the widow and others, excluding contestant, his adopted daughter, who was disinherited by an express provision leaving her one dollar. The only major change which the 1935 will made in the disposition of property under the 1933 instrument was in the provision for the brother, and in neither was any estate given to contestant.

[1] Upon the trial of the contest, the court directed a verdict for the proponents and admitted the will to probate, granting letters testamentary to Jacob Flatau. In our opinion this order was proper, for there is no substantial evidence to support the alleged grounds of contest.

The contestant called the subscribing witnesses, Drs. Chaffin and Gallant, and Ellen Moede, the nurse. Dr. Gallant had been particularly careful to assure himself that decedent knew what he was doing, and interrupted the reading of the will after every paragraph to ask whether he understood. Decedent replied each time that he did, and called for the next clause. Dr. Chaffin observed this procedure, and testified to the fact that the patient carried on this conversation with Dr. Gallant. Both doctors and the attending nurse testified that the actions of decedent were rational, and each doctor testified that he was of sound mind. There was abundant evidence from other witnesses, including his secretary and the manager of his bank, to the effect that he was a good business man, and mentally sound and alert.

The evidence relied upon to create a sufficient conflict with this testimony is that decedent suffered considerable pain in his leg; that he had been given some four doses of one grain of codein, the first on December 23 at 11:20 p. m., and the others at 3:15 a. m., 7 a. m., and 2:30 p. m.; that the brother had the will prepared by his own attorney who did not know decedent; and that the brother benefited by the will. It is also asserted that the will was unnatural in disinheriting an adopted daughter with whom decedent had always had relations of affection.

The above evidence is entirely unsubstantial. The two attending doctors and the nurse, wholly disinterested witnesses, testified emphatically that decedent was awake and in possession of his normal faculties; and the fact that decedent expressly approved each paragraph as it was read to him shows that the drugs had not impaired his capacity to hear and understand. The attempted showing of undue influence fails when it is realized that the will was drafted over a period of several months while decedent was well, and that there was no time during his stay in the hospital when his brother had any opportunity to influence him. Dr. Gallant testified that he heard no words of compulsion, and the brother was never alone in the room with decedent at any time. The disinheritance of contestant was obviously not a new thought of decedent, since the 1933 will likewise left no part of the estate to her. The suggestion that this was unnatural in view of friendly relations is answered by the undisputed fact, admitted by contestant that shortly after her marriage they became estranged. Contestant testified that their relations were always cordial, but a letter by her to decedent, which was the only communication she could recall in the entire eighteen-year period, upbraids him and his wife for alleged unfair treatment of contestant and her husband, charges him with having given her an unhappy childhood, and indicates awareness of her probable disinheritance.

[2] It is hardly necessary to cite authorities on the well-settled principles governing the admission of wills to probate, but it should be remembered that there is a strong presumption of competency (In re Estate of Wright, 7 Cal.2d 348, 60 P.2d 434; In re Estate of Perkins, 195 Cal. 699, 235 P. 45), and that far stronger showings than this have been held insufficient to establish incompetency. See In re Estate of Finkler, 3 Cal.2d 584, 46 P.2d 149; In re Estate of Sexton, 199 Cal. 759, 251 P. 778; In re Estate of Smith, 200 Cal. 152, 252 P. 325; In re Estate of Peterkin, Cal.App., 73 P.2d 897.

[3] Contestant asserts that error was committed in refusing to permit one Iona Hergert, a registered nurse attending decedent, to testify as to his testamentary capacity. The evidence was properly excluded, for no attempt was made to qualify her as an expert, and she was not an "intimate" acquaintance qualified to give a non-

expert opinion on sanity. *Atkins Corp. v. Tourny*, 6 Cal.2d 206, 57 P.2d 480.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; EDMONDS, J.

HOUSER, Justice.

I concur in the judgment.



10 Cal.2d 709

In re **GOLDBERG'S ESTATE**.

In re **BLUE et al.**

Sac. 5156.

Supreme Court of California.

Feb. 17, 1938.

1. Executors and administrators ☞315(6)

Generally, in absence of a condition such as extrinsic fraud, a decree of distribution of an estate which has become final remains so, even though from standpoint of specific provisions of will the decree is inaccurate.

2. Executors and administrators ☞315(5)

Where the language of a decree of distribution is uncertain, vague, or ambiguous, it is subject to judicial explanation or interpretation and will itself may be used to establish true meaning and intent of the decree.

3. Judgment ☞304, 306

Where it appears on face of the record that a clerical error has been committed and carried into a decree, court has authority to correct such error; but, where judicial error is manifest, after decree becomes final, the provisions of the decree may not be changed.

4. Judgment ☞306

A court has full power to determine whether an alleged error is clerical or judicial in character, and, if clerical, the court has power to set aside the interlocutory decree, correct the error, and enter judgment on the findings as corrected and conclusions of law to be drawn therefrom.

5. Judgment ☞326

A "clerical error" in a decree, which may be corrected by a nunc pro tunc order,

is literally one made by a clerk or some subordinate agent, but may be extended to include an error that has been made by the judge or by the court.

[Ed. Note.—For other definitions of "Clerical Error," see Words & Phrases.]

6. Judgment ⇨326

A court could correct nunc pro tunc a decree of final distribution of estate of decedent, which omitted name of decedent's child who was named as a devisee in decedent's will, on ground omission constituted "clerical error," where omission was obviously a mistake, notwithstanding period of 35 years elapsed after decree of distribution was ordered before correction was sought. Code Civ.Proc. § 473, as amended by St.1933, p. 1851.

7. Judgment ⇨304, 306

Under common law, courts have inherent right to timely correct clerical and judicial errors which appear in the court's decrees.

8. Judgment ⇨321

Where a clerical error in a court's decree is apparent on the face of the record, no time limit exists as far as right of the court to correct the error is concerned. Code Civ.Proc. § 473, as amended by St.1933, p. 1851.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Proceeding in the matter of the estate of Alexander Goldberg and the trust created by the will of Alexander Goldberg, deceased, wherein M. H. Blue, individually and as executor of the will of Emma Blue, deceased, and another, were contestants, and wherein Gustave Goldberg, as trustee of the trust created by the will of Alexander Goldberg, deceased, petitioned for instructions, and wherein Gustave Goldberg and others were respondents. From an order nunc pro tunc, correcting a decree of final distribution in the estate of Alexander Goldberg, deceased, the contestants appeal.

Affirmed.

Elliott, Atkinson & Sitton, of Sacramento (R. Platnauer, of Sacramento, of counsel), for appellants.

H. Nelson French, Ralph H. Cowing, and Chauncey H. Dunn, all of Sacramento, for respondents.

HOUSER, Justice.

This appeal relates to an asserted power of a probate court by which an order "nunc pro tunc" was made, which affected an order of final distribution in the matter of the Estate of Alexander Goldberg, Deceased, and which former order was made thirty-five years after the latter was entered.

The pertinent facts are that a will in said estate that was in the course of probate included a provision, of which the following is a copy of its questioned conditions: "I give devise and bequeath to my daughter Mrs. Emma Blue the following described tract of land situated in Sacramento County, State of California, * * to hold the same in trust for my son Fritz Goldberg. * * * Should my son Fritz die leaving issue, then and in that event the property shall vest in such issue. Should he die leaving a wife but no child then the same shall vest in such wife. Should my son Fritz die without either wife or child then said property shall vest absolutely in my children Gustave-Fritz-Amelia and Mrs. Emma Blue."

To the petition for final distribution of said estate a copy of the will was attached, and the prayer of the petition was that the residue of the estate "be distributed to those entitled thereto." The petition for distribution did not indicate the manner in which the estate should be distributed. The minute order of the court that followed a hearing of such petition was as follows: "Decree of distribution granted in accordance with terms of the will, and the Court directs that the proper decree be prepared and filed herein, and when filed, the same to be entered in the records of this Court on the date of filing."

Thereupon, and immediately thereafter, a decree of distribution of the estate was signed by the judge of the probate court. Among other provisions therein contained was the following: "To Mrs. Emma Blue, daughter of deceased, the legal title to the aforesaid Fritz Goldberg Tract, to be held in trust for said Fritz Goldberg for the term of his natural life * * * ; provided, that in the event that said Fritz Goldberg shall die leaving neither surviving wife or child, then and in that event the title to said tract of land shall vest in Gustave Goldberg, Amelia Goldberg and Mrs. Emma Blue, children of deceased, share and share alike in fee simple.

With the exception of Gustave, in the course of thirty-five years next ensuing, all the children of the testator had died. On the death of Fritz "without either wife or child" him surviving, Gustave, who was the executor of the will of Alexander Goldberg, deceased, presented his petition to the probate court "for instructions," but therein prayed "that he be authorized and instructed as trustee to deliver all of the assets of said trust to himself free and clear of the said trust, and that upon so doing he be discharged of all liability as trustee."

On the hearing of the said petition, evidence was taken which included the will itself, the petition for distribution of the estate, the minute order, and the order of distribution, to each of which reference hereinbefore has been had. Thereupon, by the "nunc pro tunc" order here in question, the original decree of distribution was amended.

As far as here is important, it may be noted that the effect of the "nunc pro tunc" order was to make the decree of distribution conform to the exact provision of the will; that is to say, the will having contained a provision that "should my son Fritz die without either wife or child then said property shall vest absolutely in my children Gustave-Fritz-Amelia and Mrs. Emma Blue," and the original decree of distribution having provided "that in the event that said Fritz Goldberg shall die leaving neither surviving wife or child, then, and in that event the title to said tract of land shall vest in Gustave Goldberg, Amelia Goldberg, and Mrs. Emma Blue (*omitting Fritz*), children of deceased, share and share alike, in fee simple," by the terms of the "nunc pro tunc" order it was decreed: "That the petition for distribution in the matter of the estate of Alexander Goldberg, requested that distribution be made in accordance with the terms of the will of said Alexander Goldberg. That through a clerical error, the decree of distribution in the matter of the estate of said Alexander Goldberg in two places omitted the name of Fritz Goldberg where the name of Fritz Goldberg appeared in the will; that said error should be corrected at this time; * * *

It first is contended by appellants that the lower court erred in admitting the will in evidence and thereupon in considering its contents for the purpose of "interpreting the decree of distribution"

which theretofore had been made by the court. In that connection appellants direct attention to the language contained in the minute order that was made in the lower court on the hearing of the petition for the original decree to the effect that it is there recited that the decree was "granted *in accordance with the terms of the will*," and that the court directed that "*a proper decree be prepared*"; also to the language contained in the original decree wherein it appears that it purports first to direct distribution of the estate "*among the persons entitled thereto*," and follows by the order of distribution, by which, instead of following the direction of the testator, a part of the estate was distributed to the children, Gustave, Amelia, and Emma,—omitting Fritz. On such a premise, specifically it is urged that since probate orders need not recite the existence of facts, section 1704, Code Civ.Proc.; that the presumption is that "official duty has been regularly performed"; and "that the ordinary course of business has been followed," subdivisions 15, 20 of section 1963, Code Civ.Proc.—it should result that the meaning which should attach not only to the language of the minute order, but also to that of the decree, is that the conclusion as was expressed in the original decree (even if incorrect) was that at which the court "judicially" arrived; and consequently that after the lapse of time within which an appeal might have been lawfully taken, the decree became final and that thereafter the will itself could not be properly used for the purpose of vacating or impeaching such decree.

[1,2] In general, and in the absence of some existing and affecting condition such as extrinsic fraud, or anything akin thereto, the rule would appear to be well established that even though from a standpoint of following the specific provisions of the will, a decree of distribution of the estate is inaccurate and incorrect, nevertheless after the decree has become final, for all time thereafter, it remains the unalterable measure of the rights of all persons who may be interested in the estate. *Matter of Trescony*, 119 Cal. 568, 51 P. 951; *Lankton v. Superior Court*, 5 Cal. 2d 694, 696, 55 P.2d 1170; *Goad v. Montgomery*, 119 Cal. 552, 51 P. 681, 63 Am.St. Rep. 145; *Moor v. Vawter*, 84 Cal.App. 678, 258 P. 622; and authorities therein respectively cited. However, should the language of such a decree appear to be

"uncertain, vague or ambiguous," it is subject to judicial explanation or interpretation, and in such circumstances, the will itself may be used to establish the true meaning and intent of the decree. *Fraser v. Carman-Ryles*, 8 Cal.2d 143, 64 P.2d 397; *In re Ewer's Will*, 177 Cal. 660, 171 P. 683; *Horton v. Winbiger*, 175 Cal. 149, 165 P. 423. But herein, with respect to the provision of the will that is the subject of inquiry, its language is plain and unambiguous; it requires no interpretation; nor has an interpretation of the will been suggested. The only purpose of the petition was to correct an asserted clerical error that appeared in the decree.

Such being the situation, both in regard to the facts and the general rule of law that affects the question of the conclusiveness of a decree of distribution of an estate which, ordinarily speaking, has become final, the additional specific question here presented relates to whether, the facts herein considered, the lower court had authority or power to make an order, "nunc pro tunc," by which the decree theretofore entered by the lower court could be modified or corrected as to a clerical error which appeared therein so as to make the decree conform to the express terms of the will.

[3] In that regard, it also appears to be conceded by the respective parties to this appeal that notwithstanding the general rule that even though judicial error therein be manifest, after a judgment or decree has become final, its provisions no longer properly may be subjected to change or modification, nevertheless when on the face of the record it appears that a clerical error has been committed and carried into the judgment or decree, the court has the authority and the power to correct such error. The primary inquiry, then, that is presented for determination, is whether the asserted error in the decree was the result of a clerical error. In that connection, it first becomes advisable to determine whether any error was made. To that end, a brief summary of the facts may be helpful at this point.

By the terms of the will, the testator directed that as to certain of his property it should be divided among his four children, Fritz included; the petition for distribution of the estate was that it be "distributed to those entitled thereto." In that regard, the court's minute order was: "Decree of distribution granted *in accordance with the terms of the will* and the court

directs that the *proper decree* be prepared and filed herein. * * *" Notwithstanding that situation, the decree that was signed by the judge of the court omitted the name of Fritz as a distributee of that property.

Other than the language of the decree itself, no evidence appears to the effect that the intention of the court was to make its order in opposition to the "terms of the will." As a presumption of fact and to the contrary of such an assumption, in accordance with the respective decisions in *Re Estate of Newman*, 68 Cal.App. 420, 229 P. 898; *In re Estate of Wilson*, 184 Cal. 63, 68, 193 P. 581; *Weedon v. Power*, 202 Ky. 542, 260 S.W. 385; *Ball v. Hopkins*, 254 Mass. 347, 150 N.E. 434; *Payne v. Brown*, 164 Ga. 171, 137 S.E. 921, and 13 A.L.R. 615, 620, it appears as a matter of law that the estate of Fritz was empowered to take as a remainderman; from which it should follow as a natural inference that with knowledge of the law in the premises, the intention of the probate court was to perform its legal duty and direct the distribution of the estate in accordance with "the terms of the will." That an error was committed is obvious. Moreover, by its findings of fact made by the court with relation to the application for the order "nunc pro tunc," in substance the court declared: "That through a clerical error, the decree of distribution in the matter of the estate of said Alexander Goldberg in two places omitted the name of Fritz Goldberg where the name of Fritz Goldberg appeared in the will; that said error should be corrected at this time; * * *"

[4] And particularly with reference to the authority of the court to determine the character of the error, in the case of *Harman v. Cabaniss*, 207 Cal. 60, 276 P. 569, 570, it was declared that: "It [the court] has full power to determine whether the alleged error was clerical or judicial in character, and, if clerical, to set aside the interlocutory decree, correct the error, and enter judgment on the findings as corrected and conclusions of law to be drawn therefrom."

[5] Ordinarily, although originally and in its literal significance, a "clerical error" is one that has been made by a clerk or some subordinate agent, latterly the meaning has been broadened and extended so that it now may include an error that may

have been made by the judge or by the court.

In the case of *Wilder v. Bush*, 201 Ala. 21, 75 So. 143, 144, 146, it was said that: "Clerical errors" in the journals of the court are not only those made by the clerk, but also those mistakes apparent on the record, made by counsel or even by the court in the progress of the trial."

And in *Bessemer I. D. Co. v. West Pueblo D. & R. Co.*, 65 Colo. 258, 176 P. 302, it was ruled that: "A 'clerical error' in the record of a judgment, as regards correction, includes one made by the court which cannot reasonably be attributed to exercise of judicial consideration or discretion."

To the same effect, see *Enderlin F. S. Co. v. Witliff*, 56 N.D. 380, 217 N.W. 537, and *Wilson v. City of Fergus Falls*, 181 Minn. 329, 232 N.W. 322.

In the case of *Bemmerly v. Woodward*, 124 Cal. 568, 57 P. 561, it was held (syllabus): "Where there is an error in the caption of the complaint and of the judgment in describing the plaintiffs both as heirs and administrators, but the body of the complaint shows that plaintiffs sue in their representative capacity, and that the estate is not distributed, which facts are admitted by the answer, an error in rendering judgment for the plaintiffs individually, instead of in their representative capacity, is a mere clerical error, apparent upon the face of the record, which might be corrected at any time. * * * The signature of the judge to the judgment does not establish that the error in the judgment is not a clerical error." And in *Kowalsky v. Nicholson*, 23 Cal.App. 160, 137 P. 607, the ruling was to the same effect.

In 14 California Jurisprudence, pp. 995, 996, the rule is thus stated: "But the power to amend is not wholly confined to the correction of an erroneous record; it extends also to cases where some provision of or omission from an order or judgment as made or rendered was due to the inadvertence or mistake of the court and may therefore properly be treated as a clerical misprision rather than a judicial error. * * * There are many cases in which it so clearly appears that the judgment as entered is not the sentence which the law ought to have pronounced upon the facts as established by the record, that the court acts upon the presumption that the error is a clerical misprision rather than a judicial blunder, and sets the judg-

ment, or rather the judgment entry, right by an amendment nunc pro tunc," following which, the author cites several California authorities wherein the rule as announced is fully supported. See, also, *Christie v. Christie*, 99 Cal.App. 53, 277 P. 872; *Dahlberg v. Dahlberg*, 92 Cal.App. 639, 268 P. 695, and the text on page 1001 of vol. 14, Cal.Jur.

[6] In the instant case, it therefore would appear to be fairly established not only that the error of which complaint has been made was clerical in its nature, but also that the court was well within its authority in ordering its correction.

Notwithstanding the general authority of the court to make such correction, in reliance upon the provisions of section 473, Code of Civil Procedure, as amended by St.1933, p. 1851, and the cases of *Scamman v. Bonslett*, 118 Cal. 93, 50 P. 272, 62 Am.St.Rep. 226, and *Goatman v. Fuller*, 191 Cal. 245, 216 P. 35, appellant contends that the court had lost and was without jurisdiction to make the order, for the reason that a period of thirty-five years had elapsed after the decree of distribution was ordered before the petition for the issuance of a "nunc pro tunc" order with reference thereto was presented to the court.

Although the pertinent provisions of section 473, Code of Civil Procedure, are that, "The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed," nevertheless appellant asserts that in accord with other applicable portions of the statute, the petitioner was required to present to the court his application for relief within one year (six months) after the judgment or decree had been entered.

[7] In that connection, it may be noted that the foregoing quoted portion of section 473, Code of Civil Procedure, constitutes a part of an addition that was made to the original statute by legislative enactment which appears in Statutes of 1933, p. 1851. Prior thereto, and after the effective date of Statutes of 1919, p. 730, the substance of such added matter was contained in section 900a, Code of Civil Procedure, which is a part of part 2, title 11, of the Code of Civil Procedure that relates to proceedings in justices' courts. But especially with reference to clerical errors either in the entry of the judgment

or decree, or with reference to inadvertence of the court, notwithstanding the absence of direct statutory provision by which courts in general were authorized to timely correct both clerical and judicial errors that appeared in their own judgments, in accord with common-law precedent, the courts universally have recognized the existence of an inherent right or power to do so. 14 Cal.Jur. 991 et seq.

[8] The authorities to which appellant has referred have no application to a situation such as is here disclosed. They relate to judicial errors only. But as to clerical errors, when the error is apparent from the face of the record, no time limit exists as far as the right to make the correction is concerned. *Halpern v. Superior Court*, 190 Cal. 384, 212 P. 916; *Scamman v. Bonslett*, 118 Cal. 93, 50 P. 272, 62 Am. St.Rep. 226; *Dickey v. Gibson*, 113 Cal. 26, 45 P. 15, 54 Am.St.Rep. 321; *Brush v. Pacific Elec. Ry. Co.*, 58 Cal.App. 501, 208 P. 997; *People v. O'Brien*, 4 Cal.App. 723, 89 P. 438.

As hereinbefore has been indicated, this court is of the opinion that the asserted error in the order of distribution of the estate was not only clerical in its nature and apparent from an inspection of the record, but was one which, notwithstanding the lapse of so many years, was correctible by the court at any time.

It becomes unnecessary to consider other points that have been suggested by the respective parties to the appeal.

The order is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; EDMONDS, J.



10 Cal.2d 697

BATES v. McTAMMANY (two cases).

Sac. 5139, 5140.

Supreme Court of California.

Feb. 16, 1938.

1. Partnership ⚡61

A partnership, formed to conduct radio station so long as license therefor could be obtained from federal government, was not

76 P.2d—33

a "partnership at will" which could be terminated under statutes at election of either of the partners. Civ.Code, §§ 2425(1) (b), 2426(2) (b).

[Ed. Note.—For other definitions of "Partnership at Will," see Words & Phrases.]

2. Partnership ⚡313

Equitable principles apply in determining rights of parties to action for accounting between partners, for dissolution of partnership, and for settlement of partnership affairs.

3. Partnership ⚡313

Equity can refuse dissolution and act to prevent loss to partnership if it is expedient to do so, rather than to relegate plaintiff to his action for damages for breach of contract.

4. Partnership ⚡315

While an indissoluble partnership does not exist, grounds for premature dissolution must be serious and will not be recognized as justifiable when the suit is by the partner found to be at fault and when such dissolution will cause losses to partnership or destruction of value of partnership assets or property.

5. Partnership ⚡317

A partnership formed to conduct radio station so long as license therefor could be obtained from federal government was not subject to dissolution by partner who had not fully and fairly performed partnership agreement, where dissolution would destroy a large part of value of partnership business.

In Bank.

Appeal from Superior Court, Stanislaus County; L. J. Maddux, Judge.

Actions by William H. Bates, Jr., against T. R. McTammany to establish a trust for the benefit of a partnership between the parties and for an accounting of partnership funds. The defendant filed cross-complaints. From the judgments, the defendant appealed. The appeals were consolidated.

Affirmed.

Griffin & Boone, of Modesto, for appellant.

Cleary & Zeff, of Modesto, and Joseph J. Yovino-Young, of Oakland, for respondent.

SHENK, Justice.

The plaintiff and the defendant formed a copartnership for the purpose of conducting radio station KTRB in the city of Modesto. Subsequently the plaintiff commenced two actions against the defendant. In one he sought to establish a trust for the benefit of the partnership in the real property occupied by the radio station, title to which was held in the name of the defendant. In the other he prayed for an accounting, payment of accrued and overdue partnership debts out of accumulated partnership funds, and equal division of the surplus between the partners. In the first action the defendant joined issue by answer and filed a cross-complaint setting up a claim of sole ownership in himself of the property. In the second action he filed an answer and a cross-complaint claiming 67 per cent. ownership of the partnership funds and assets and alleging lack of cooperation on the part of the plaintiff. He asked for an accounting and a division on the basis of his alleged ownership. By a supplemental cross-complaint he sought a termination of the partnership on the ground of the plaintiff's lack of cooperation theretofore alleged. By an amended supplemental cross-complaint he prayed for a dissolution on the theory that it was a partnership at will, and based on an election by him to terminate the partnership and wind up its affairs.

The trial court found that the parties were equal partners; that the real and the personal property were owned by the parties equally; and that title to the real property was held by the defendant as trustee for the partnership. It adjudged the plaintiff's right to a conveyance of the real property to the partnership. It found against the defendant on the issues presented by the cross-complaints, denied the defendant's prayer for dissolution, ordered payment of the partnership debts, and a division of the remaining funds, with the exception of approximately \$2,000, equally between the partners.

The defendant appealed from the judgment in each action. The appeals are consolidated in one transcript and are now considered together.

The defendant does not appear to question the correctness of the judgment in the first action, nor the conclusion of the court that the parties are equal partners. The only ground of appeal is that the court

erred in denying the defendant the right to a dissolution of the partnership.

The partnership was formed on October 1, 1933. A year later the parties reached an accord concerning the status of the partnership assets and liabilities, which disclosed that the plaintiff had contributed to the partnership about \$300 more than the defendant. On October 1, 1936, undisbursed and undivided partnership funds to the extent of \$16,572.46 had accumulated on deposit in banks. Partnership obligations, in addition to the excess contribution of the plaintiff, amounted to nearly \$4,000. The partnership was liable for seven per cent interest on that sum, but its funds on deposit were not drawing interest. The trial court found that the defendant, whose signature was required on all checks, had refused to sign or countersign checks for the payment of the partnership debts, although there was ample money on hand for the purpose, and refused to sign any checks dividing the profits between the parties. The court also found that the plaintiff had not refused to render an account or to cooperate in handling the partnership affairs, but that the defendant had so conducted himself toward the partnership that it became extremely difficult to carry on the business of the partnership in a practical, economical, or businesslike manner; that the defendant denied to the plaintiff the use of the key to the partnership mail box; that he kept the partnership books under lock and key and refused access thereto to the plaintiff; and that his refusal to pay the partnership debts had caused considerable loss. On the issues raised by the application of the defendant for dissolution, the court expressly found that the defendant had not come into equity with "clean hands"; that to order a dissolution at the time would destroy a large part of the value of the business due to the fact that a federal license to operate the radio station was under the control of the federal communications commission and could not be sold at a dissolution sale. The court further found that the "partnership was formed for the purpose of building, constructing, operating and maintaining radio station KTRB so long as the license therefor could be obtained from the federal government," and that the station was operating on a license that must be renewed every six months.

[1] The evidence, including that referred to by the defendant, supports the

foregoing findings. However, the defendant contends that the partnership was one at will and that, without any further consideration, he was entitled to a dissolution pursuant to sections 2425 (1) (b) and 2426 (2) (b) of the Civil Code. The first of those sections states that a dissolution is caused "by the express will of any partner when no definite term or particular undertaking is specified." The other permits a dissolution by decree of court under prescribed circumstances if the partnership be one at will. The finding that the partnership was formed for a definite undertaking, namely, for the construction, operation and maintenance of the radio broadcasting station KTRB, and so long as the federal license therefor could be procured, is fully supported by the record, and negatives any conclusion which otherwise might be drawn that the partnership was one at will. A finding now as matter of law that the partnership was of that nature would not be justified.

[2, 3] Equitable principles apply in determining the rights of the parties to an action for an accounting between partners, for dissolution of the partnership, and settlement of its affairs. *Freeman v. Donohoe*, 65 Cal.App. 65, 79, 223 P. 431. No serious contention may be made that the defendant, himself at fault, may prevail on his application for a dissolution if it would cause loss to the partnership. Equity may refuse dissolution and act to prevent the loss to the partnership if it is expedient to do so, rather than to relegate the plaintiff to his action for damages for breach of the contract. *Gerard v. Gateau*, 84 Ill. 121, 25 Am.Rep. 438.

In *Karrick v. Hannaman*, 168 U.S. 328, 18 S.Ct. 135, 138, 42 L.Ed. 484, it was said: "A court of equity, doubtless, will not assist the partner breaking his contract to procure a dissolution of the partnership, because, upon familiar principles, a partner who has not fully and fairly performed the partnership agreement on his part has no standing in a court of equity to enforce any rights under the agreement," citing *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 358, 19 L.Ed. 955. See, also, *Josephthal v. Gold*, 104 Misc. 137, 171 N.Y.S. 1041, 1042.

[4] It is true that the foregoing cases necessarily recognize that there can be no such thing as an indissoluble partnership, and that circumstances may arise which would make it inexpedient for a court of

equity to prevent the dissolution. Nevertheless the grounds for premature dissolution must be serious, and will not be recognized as justifiable when the suit is by the partner found to be at fault and when such dissolution will cause losses to the partnership or destruction of the value of partnership assets or property.

[5] The defendant has not shown error or abuse of discretion on the part of the trial court.

The judgment is affirmed.

We concur: WASTE, C. J.; HOUSER, J.; CURTIS, J.; EDMONDS, J.



25 Cal.App.2d 89

**PASSOW v. SUPERIOR COURT IN AND
FOR CITY AND COUNTY OF SAN
FRANCISCO.**

Civ. 10770.

**District Court of Appeal, First District,
Division 2, California.**

Feb. 16, 1938.

1. Courts ⇨116(1)

The trial court, in proceeding to strike the settlement and certification of bill of exceptions by trial judge, had jurisdiction to alter or amend its records so as to cause them to "speak the truth."

2. Prohibition ⇨3(1), 10(2)

Writ of prohibition would not lie in favor of petitioner who contended that respondent court which had jurisdiction to amend its records so as to cause them to speak the truth threatened to correct judicial errors, since reviewing court would not assume that respondent court would exceed its jurisdiction, and if it should, the petitioner would have an adequate remedy at law.

Proceeding by Henry E. Passow against the Superior Court of the state of California in and for the City and County of San Francisco for a writ of prohibition.

Writ denied.

Robert E. Hatch, of San Francisco, for petitioner.

PER CURIAM.

[1,2] The petition for a writ of prohibition is denied upon the grounds that, in the proceeding pending before the respondent court to strike "the settlement and certification of the bill of exceptions" by the trial judge, the respondent court has jurisdiction to alter or amend its records so as to cause them to "speak the truth." *Dowd v. Superior Court*, 69 Cal.App. 4, 230 P. 961; *In re Silva*, 213 Cal. 446, 450, 2 P.2d 341. Though the petitioner herein contends that the respondent court threatens to go beyond these limits and to correct judicial errors theretofore made, we may not assume that the respondent court will exceed its jurisdiction in that respect. But, if this should occur, the petitioner has an adequate remedy at law.



25 Cal.App.2d 99

Ex parte ELLIS.

Cr. 3027.

District Court of Appeal, Second District,
Division 1, California.

Feb. 16, 1938.

1. Municipal corporations ⇨626

Discrimination alone will not invalidate ordinance dividing city into districts for purposes of regulating uses which may be made of the properties situated in the several districts unless such discrimination is wholly unreasonable.

2. Municipal corporations ⇨601

The tests of validity of ordinance dividing city into districts for purpose of regulating the uses which may be made of properties situated in the several districts are whether ordinance bears reasonable relation to public health, morals, safety, or general welfare, and whether districts have been created according to fair and rational plan.

3. Municipal corporations ⇨600

An ordinance delimiting a district in which bees could be kept and prohibiting the keeping of bees outside the district was valid where districts were created under a general comprehensive plan which sought to exclude keeping of bees in thickly populated areas and to permit keeping of bees in

thinly populated areas, notwithstanding that district in which bees were prohibited contained some ranch land and mountainous regions suitable for bee culture and that district in which bees were allowed contained closely built-up residential and business districts unsuitable for bee culture.

4. Municipal corporations ⇨121

An owner of small lot in district in which bees were prohibited by ordinance could not assert that ordinance was invalid on ground that it discriminated against owners of large tracts of agricultural land in the district.

5. Municipal corporations ⇨121

A landowner cannot complain of dividing city into districts for purpose of regulating uses which may be made of properties situated in the several districts unless his rights in use and enjoyments of his property have been infringed.

6. Municipal corporations ⇨600

An ordinance delimiting a district in which bees could be kept and prohibiting the keeping of bees outside of the district was not invalid for failure to include all thickly populated areas in restricted district.

7. Municipal corporations ⇨600

That the keeping of bees was permitted on one side of the street and prohibited on the other side did not invalidate ordinance delimiting a district in which bees could be kept and prohibiting the keeping of bees outside the district, where ordinance was enacted under a general comprehensive plan.

8. Municipal corporations ⇨63(1)

The municipal authorities, and not the courts, must draw the lines in zoning a city.

9. Municipal corporations ⇨63(2)

The courts cannot annul an ordinance on ground that a better law could have been drawn, unless law is so arbitrary and unreasonable as to show a failure to exercise a fair legislative discretion.

10. Municipal corporations ⇨121

The owner of a small lot in built-up portion of city could not assert that ordinance excluding bees from district in which her property was located was invalid where no injustice resulted to owner from inclusion of her property in restricted district.

Habeas corpus proceeding by Edna Ellis, who had been taken into custody upon a

charge of violating a city ordinance regulating the keeping of bees.

Writ discharged and petitioner remanded.

S. S. Hahn and W. O. Graf, both of Los Angeles, for petitioner

Ray L. Chesebro, City Atty., Newton J. Kendall, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for respondent.

YORK, Presiding Justice.

The petition filed herein for a writ of habeas corpus would not have been granted had the true facts been set forth therein. However, there has since been filed a stipulation which corrects the misstatements contained in said petition.

The opinion and order of the appellate department of the superior court of Los Angeles county in the matter of the application of the same petitioner for a writ of habeas corpus properly determines the matter, although the same mistakes above referred to, as to some of the facts, are contained in that opinion. One misstatement is as to the size of the lot occupied by petitioner. Instead of the large lot described in her original petition and in the opinion above referred to, she occupied but a small city lot approximately 50 feet in width and 147.68 feet in depth, of which about 50 feet by 100 feet is not devoted to residence purposes by said petitioner. Said lot abuts on the rear a lot of similar width and of approximately similar depth which fronts on Goodwin avenue in the city of Los Angeles, which lot is also occupied by a residence. The property fronting on said Goodwin avenue is divided into lots of 50 feet in width, each of which is occupied by one or more dwellings. The property fronting on Sequoia street—on which street the property of petitioner fronts—is divided into lots each of which is 50 feet in width, the lots on both sides of said street being of equal width, and each of the lots fronting upon said Sequoia street and upon the south side of Goodwin avenue are occupied by one or more inhabited dwellings, with the exception of occasional lots which have not yet been built upon.

It was under the opinion and order of the superior court, a copy of which is contained in the return to the writ, that petitioner was remanded to the custody of the chief of police of the city of Los

Angeles. Said opinion and order is incorporated herein, as said opinion, taken with the statement of facts hereinbefore set out, answers all of the points raised by petitioner in this matter:

"In the Superior Court of the State of California, in and for the County of Los Angeles. In the Matter of the Application of Edna Ellis, For a Writ of Habeas Corpus. No. 7565. Opinion and Order.

"Petitioner seeks her release by habeas corpus from custody upon a charge of violation of a city ordinance regulating the keeping of bees. By the terms of the ordinance (Sec. 34.15 of the Municipal Code, Ordinance No. 77,000), a district was delimited in which bees may lawfully be kept and their keeping outside of the district was made unlawful. This district may be described generally as embracing the San Fernando Valley and the mountainous regions lying between that valley and the ocean, and extending from the city of Beverly Hills northerly to the city boundary line. These areas are identified in the ordinance as being two parcels of territory annexed to the city and known as the San Fernando district and the Westgate district, with a reference to the date of each annexation. The former contains 169.89 square miles and the latter 48.67 square miles. The remainder of the city contains some 232.19 square miles.

[1-10] "Petitioner lives and keeps a few stands of bees upon a lot 150 feet by 250 feet, located in the vicinity of the Los Angeles riverbed, north of Los Feliz Boulevard, and between Griffith Park and San Fernando Road. It is a residential district in the restricted area; hence petitioner's arrest. She attacks the ordinance upon constitutional grounds. Her claim that it unlawfully discriminates against her is based upon two sets of facts, first; that in the area in which the keeping of bees is prohibited, there are many localities fully as suitable for bee culture as those in which that pursuit is allowed, and second; that there are in the latter district a number of closely built up residential and business districts which are unsuitable for the business of apiarists. But while the facts are as contended by petitioner, it does not necessarily result that the ordinance is invalid. There is discrimination in the ordinance, as there must be in all ordinances of this type, but discrimination alone, unless it be wholly

unreasonable, will not invalidate an ordinance which divides a city into districts for the purpose of regulating the uses which may be made of the properties situated in the several districts. The tests of validity in such cases are: Does the ordinance bear a reasonable relation to the public health, morals, safety or general welfare; have the districts been created according to a fair and rational plan? We are of the opinion that the ordinance successfully meets these tests. The San Fernando Valley is largely given over to ranching; by far the greater part of the Westgate district lies in rugged mountain territory. Both districts are admirably adapted to the business of apiarists. Comparable areas in the districts in which bees are not allowed to be kept are comparatively few in number, although they do embrace some thousands of acres of ranch land and mountainous regions. It may be conceded that the ordinance falls short of perfection; a more meticulous discrimination than the one disclosed by the ordinance might have acknowledged the fitness of these large vacant or sparsely settled areas for the bee business, and might also have recognized as unsuitable for that use such districts as the one located between Sunset and Pico Boulevards, west of the city of Beverly Hills. Although somewhat ragged around the edges the ordinance as a whole is well patterned. There has been set aside for those desiring to engage in the business, a district of some 140,000 acres, or nearly one-half of the area of the entire city. The business of keeping bees has been excluded from nearly all of the city proper. Such exclusion is not unreasonable. City people unaware of the inherent proclivity of bees to attend strictly to their own business, and not understanding that bees are by nature retaliatory rather than aggressive, become excited and apprehensive of unprovoked assault when bees appear, confusing their motives with those of the mosquitoes. Bees annoy them. But more serious than mere annoyance is the fact that the not infrequent combination of a bee and an excited motorist in the same automobile presents a major traffic hazard. And because the business of bees keeps them on the wing most of the time, their hives must be removed quite a distance from the centers of population, if the city people are to have the protection which they are believed to require. This the ordinance

attempts to accomplish. Petitioner's property may be of a sufficient size to allow her lawfully to keep other creatures which are welcome in a rural community, but offensive to neighbors when harbored in the city. But this fact does not aid her case. Regulation which would be adequate in the case of goats, rabbits or other animals which may be confined within property lines (non constat that the odors do not remain vagrant), might be wholly ineffective as applied to bees. Petitioner's bees presumably are at large, and know nothing as to the size of her premises. It cannot reasonably be claimed that everyone having a lot of 150 by 250 feet has the right to maintain thereon an apiary. If the ordinance should be considered as an unlawful discrimination against owners who have large tracts of agricultural land in the restricted area, petitioner is not thereby hurt, because, owning nothing more than a large city lot, she can not claim to be in their situation. It is with her rights, and not those of land owners differently situated, that we are concerned. She may not complain of the ordinance unless her own rights in the use and enjoyment of her property have been infringed. *Brown v. City of Los Angeles*, 1920, 183 Cal. 783, 787, 192 P. 716; *Ex parte Quong Wo*, 1911, 161 Cal. 220, 233, 118 P. 714; *People v. Rogers*, 1931, 112 Cal.App. 615, 618, 297 P. 924; *A. F. Estabrook Co. v. Ind. Acc. Comm.*, 1918, 177 Cal. 767, 770, 177 P. 848; *People v. Steelik*, 1921, 187 Cal. 361, 375, 203 P. 78. Nor is the ordinance invalid because it fails to include in the restricted district all of the thickly populated areas. It was for the City Council to say where the lines were to be drawn. *Ex parte Hadacheck*, 1913, 165 Cal. 416, 422, 132 P. 584, L.R.A. 1916B, 1248; *Hadacheck v. Sebastian*, 1915, 239 U.S. 394, 413, 414, 36 S.Ct. 143, 60 L.Ed. 348, Ann.Cas.1917B, 927. When this has been done under a general comprehensive plan, it is no objection to the legality of the result that the apiarists are to be found on one side of the street but not on the other. The courts have no power to dictate to the Council as to how the city should be zoned. A law can not be annulled by the courts merely because it is believed that a better one could have been drawn, nor unless it is so arbitrary and unreasonable as to show a failure to exercise a fair legislative discretion. Petitioner has wholly failed to show any injustice resulting from the inclusion of her

property in the restricted district. For the reasons stated and upon the foregoing authorities the ordinance must be sustained. See, also, *Zahn v. Board of Public Works*, 1925, 195 Cal. 497, 514, 234 P. 388; *Miller v. Board of Public Works*, 1925, 195 Cal. 477, 490, 234 P. 381, 38 A.L.R. 1479; *Sunny Slope Water Co. v. City of Pasadena*, 1934, 1 Cal.2d 87, 93, 94, 33 P.2d 672.

"The writ is discharged and the petitioner is remanded. * * * Dated Aug. 30, 1937."

For the reasons hereinbefore stated, the writ is discharged and petitioner is remanded.

We concur: DORAN, J; WHITE, J.



25 Cal.App.2d 75

BOLSA LAND CO. v. VAQUEROS MAJOR OIL CO., Limited, et al. (STATE, Intervener).

Civ. 5991.

District Court of Appeal, Third District,
California.

Feb. 15, 1938.

Hearing Denied by Supreme Court
April 14, 1938.

1. Evidence ⇐8

The law notices the "high spring tides," which are the fluxes of the sea and those tides which happen at the two equinoctials, the "spring tides," which happen twice every month at the full and change of the moon, and the "neap" or ordinary tides, which happen at the change and full of the moon, twice in 24 hours. Civ.Code, § 670.

[Ed. Note.—For other definitions of "Neap Tide," see Words & Phrases.]

2. Navigable waters ⇐36(3)

"Tidelands" are such as are covered and uncovered by the flow and ebb of the ordinary or neap tides. Civ.Code, § 670.

"Tideland," in the usual meaning of the term, is land between the lines of the ordinary high and low tides, covered and uncovered successively by the ebb and flow thereof; land covered and uncovered by the ordinary tides; land over which the tide ebbs and flows; land which

is daily covered and uncovered by water by the ordinary ebb and flow of normal tides; land usually overflowed by the neap or ordinary tides; such land as is affected by the tide, that lies between ordinary high-water mark and low-water mark, and which is alternately covered and left dry by the ordinary flux and reflux of the tides; that portion of the shore or beach covered and uncovered by the ebb and flow of ordinary tides.

[Ed. Note.—For other definitions of "Tide Lands," see Words & Phrases.]

3. Navigable waters ⇐36(3)

The United States Geodetic Survey may be taken into consideration in determining the height of the tide for the purpose of ascertaining the extent of state sovereignty in the tidelands. Civ.Code, § 670.

4. Navigable waters ⇐36(3)

The mean of the neap tide must be taken into consideration in determining the high-water mark, irrespective of the wash of the waves or the run of the sea water upon the coast in determining the limit of the state sovereignty. Civ.Code, § 670.

5. Navigable waters ⇐36(3)

The run or reach of sea water does not measure the height of the tide, nor does the run, roll, or reach of the waves constitute the measure of the rise of the tide in determining the limit of the state sovereignty, and in like manner tidewater is confined to the level of the rise of the tide and not to the run or reach of the waters caused by the waves or swell of the ocean. Civ.Code, § 670.

6. Navigable waters ⇐36(3)

"Ordinary high-water mark," as used in statute declaring the state to be the owner of lands below "ordinary high-water mark," means a line ascertained from the mean rise of the tide and a horizontal line projecting therefrom to the shore, irrespective of the run or wash of the waves, or reach of the water caused by the waves or swell of the ocean. Civ.Code, § 670.

[Ed. Note.—For other definitions of "Ordinary High-Water Mark," see Words & Phrases.]

7. Navigable waters ⇐36(3)

Under statute declaring the state of California to be the owner of lands below "ordinary high-water mark," the assignees of a permit issued by the state to explore certain tidelands for oil were not authorized to

explore beyond the line determined by the mean of the tide and a horizontal line projecting therefrom to the shore, irrespective of the extent of wave wash or run of the water on the coast. Civ.Code, § 670.

8. Appeal and error ⇐878(6)

A judgment restraining defendants from trespassing on certain property of plaintiff lying above "ordinary high-water mark" would not be modified because of trial court's failure to take into consideration all the tides in fixing the actual mean rise thereof which would have redounded to plaintiff's benefit, in absence of appeal by plaintiff from the judgment; the action not being one to quiet title. Civ.Code, § 670.

Action by the Bolsa Land Company against the Vaqueros Major Oil Company, Limited, and others, wherein the State of California intervened, to enjoin alleged trespass. Judgment for plaintiff, and defendants and intervenor appeal.

Affirmed.

U. S. Webb, Atty. Gen., L. G. Campbell, Walter L. Bowers, R. S. McLaughlin, and Webb Shadle, Deputies Atty. Gen., and Pease & Dolley and Adolph H. Levy, all of Los Angeles, for appellants.

Gibson, Dunn & Crutcher and J. Stuart Neary, all of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This is an appeal by the defendants and intervenor from a judgment in favor of the plaintiff, in which action it was found by the court that the defendants had trespassed upon certain property belonging to the plaintiff, and thereupon granted an injunction restraining further acts of trespass.

The real question before this court for our consideration is the method of ascertaining the line of demarkation between lands classed as "tidelands" and lands classed as "uplands."

The defendants in the action entered upon certain lands, as assignees of a permit issued by the state of California granting certain drilling rights for the purpose of exploring certain tidelands for oil and other mineral substances. The plaintiff alleged that the structures erected by the defendants were partly upon lands owned by the plaintiff.

As the alleged trespass has been discontinued, we have, as just stated, only

the question of determining the method of ascertaining the line designated as "ordinary high water mark," as found in section 670 of the Civil Code. That section specifies that the state is the owner of all lands below tide water and below ordinary high-water mark.

The defendants and the intervenor contended in the trial court, and likewise insist upon this appeal, that the term "ordinary high water mark" means a line along the shore left by the highest run or reach of the water, or stated in the language of their brief: "1. Does this term 'ordinary high water mark' mean the line reached on the beach by the edge of the sea water when an ordinary high tide is at its full, and where the edge of such sea water on the beach leaves its visible mark upon the shore, plain to all or, 2. Does such term 'ordinary high water mark' mean an imaginary theoretical contour line arrived at by projecting to its intersection with the shore, the plane of the vertical rise of the tide only, and completely eliminating the higher line on the shore reached by the natural flow of the sea water when such tide is at its full?"

Stated in other language: Does the ordinary high-water mark mean the run or reach of the water or waves upon the shore, or does it mean the vertical rise of the tide, and then the horizontal line projecting therefrom intersecting the shore? The uncertainty seems to arise from the confusion of the run of the sea water or reach of the sea water as it dashes up against the shore with what is really intended by the term "ordinary high water mark" as determined by the actual rise of the tide. Or, expressed in other words: Does the run or reach of the sea water upon the shore as it advances and recedes, have any connection whatever in legal meaning with what is known as tide water?

The respondent contended in the trial court, and upon this appeal contends, that the "ordinary high water mark" is to be determined by ascertaining the mean ordinary rise of the tides, and then projecting a horizontal line to the shore. In determining the mean rise of the tides and what is meant thereby, it appears that the federal government has adopted a rule which takes into consideration all of the tides, while the rule adopted by the state of California includes only what is ordinarily called "neap" tides. Wherever the lands are granted by the federal govern-

ment, a federal question of course is involved, and the rule adopted by the Supreme Court of the United States is controlling.

In the determination of the present controversy it appears that the court excluded certain of the higher tides which under the federal rule should have been included.

The appellants contend that the position taken by the respondents and by the trial court is in furtherance of a rule which is new and novel, and that the true method of determining "ordinary high water mark" is the line left by the water along the shore. This contention, however, does not seem to be supported by the authorities.

[1,2] In 1908, in the case of *Eichelberger v. Mills Land & Water Co.*, 9 Cal. App. 628, 100 P. 117, 122, in considering the finding made by the trial court, the language used is as follows: "This is not a finding as to the width of the tract, for the reason that neither 'the point of extreme reach of the wash of the waves,' nor 'the highest point of tide level,' constitutes the boundary line of lands bordering on the ocean. 'The law takes notice of three kinds of tides, viz.: (1) The high spring tides, which are the fluxes of the sea, and those tides which happen at the two equinoctials; (2) the spring tides, which happen every month, at the full and change of the moon; (3) the neap or ordinary tides, which happen at the change and full of the moon, twice in 24 hours.'" (Citing authorities.) "Tidelands are such as are covered and uncovered by the flow and ebb of the ordinary or neap tides."

In *Forgeus v. County of Santa Cruz*, 24 Cal.App. 193, 140 P. 1092, 1095, where the court held that the determination of the ordinary high-water mark was a question of fact, and that the line determined by the United States Geodetic Survey might be taken into consideration, it was held, also, that the term "ordinary high-water mark" meant the limit reached by the neap tides, that is, those tides which happen between the full and change of the moon twice in every twenty-four hours (citing authorities), and then refers to the *Eichelberger Case*, *supra*, as follows: "To the extent that it is in point at all, supports the position of appellant, inasmuch as it is held that a tract of land described as bordering upon the Pacific Ocean is delimited by 'the line to which the flow of the water reaches at ordinary or neap

tide, unaffected by wind or wave, not the line of extreme high tide nor extreme reach of the wash of the waves.'"

In *F. A. Hihn Co. v. City of Santa Cruz*, 170 Cal. 436, 150 P. 62, 65, the court said: "The high-water mark, which defines the limit of the state's sovereignty, is the usual or ordinary high-water mark. 'By that designation we mean the limit reached by the neap tides; that is those tides which happen between the full and change of the moon, twice in every 24 hours.'"

In 62 C.J. page 951, "tideland" is described as follows: "In the usual meaning of the term, land between the lines of the ordinary high and low tides, covered and uncovered successively by the ebb and flow thereof; land covered and uncovered by the ordinary tides; land over which the tide ebbs and flows; land which is daily covered and uncovered by water by the ordinary ebb and flow of normal tides; land usually overflowed by the neap or ordinary tides; such land as is affected by the tide, that lies between ordinary high-water mark and low-water mark, and which is alternately covered and left dry by the ordinary flux and reflux of the tides; that portion of the shore or beach covered and uncovered by the ebb and flow of ordinary tides."

In *Otey v. Carmel Sanitary District*, 219 Cal. 310, 26 P.2d 308, 310, the latest expression of our Supreme Court as to the meaning of "ordinary high-water mark" is thus worded: "Ordinary high-water mark is the limit reached by the neap or twice-a-day tides" (citing authorities).

In 26 California Jurisprudence, page 321, § 536, the term "high-water mark" is thus defined: "The high-water mark, which defines the limit of the state sovereignty, is the usual or ordinary high-water mark, that is, the limit reached by the neap tides, or those tides which happen at the change and full of the moon, twice in every twenty-four hours, rather than the monthly spring or extraordinary tides. That is to say, it is the line which the flow of the water reaches at ordinary or neap tide unaffected by wind or wave, not the line of extreme high-tide, nor the extreme reach of the wash of the waves, that constitutes the boundary line of a tract bordering on the ocean or other tidal waters. How far the tide reaches is a question of fact."

[3-5] As we have seen in the case of *Forgeus v. County of Santa Cruz*, *supra*,

the United States Geodetic Survey may be taken into consideration in determining the height of the tide. In all the cases which we have cited the California rule is that the mean of the neap tide shall be taken into consideration in determining the high-water mark; that is, it is the mean level of the tide, and not merely the wash of the waves or the run of the sea water upon the coast. Every case gives exactly the same definition—mean level of the neap tides. No consideration whatever is given to the wash of the waves or the reach or the run of the sea water upon the coast. Such movements of the sea are not considered in determining the height of the tide. In other words, the run or reach of the sea water does not measure the height of the tide. Nor does the run, roll, or reach of the waves constitute the measure of the rise of the tide. Likewise, tide-water is confined to the level of the rise of the tide, and not to the run or reach of the waters caused by the waves or swell of the ocean.

In the case of *Borax Consolidated Co. v. City of Los Angeles*, 296 U.S. 10, 56 S.Ct. 23, 29, 80 L.Ed. 9, the rule is thus stated: "The tideland extends to the high-water mark. [Citing a number of cases.] This does not mean, as petitioners contend, a physical mark made upon the ground by the waters; it means the line of high water as determined by the course of the tides. By the civil law, the shore extends as far as the highest waves reach in winter. [Citing authorities.] But by the common law, the shore 'is confined to the flux and reflux of the sea at ordinary tides.'"

The opinion in this case quotes largely from the language of certain English cases, but finally adopts the rule for determining the line of demarkation ascertained by the Geodetic Survey, taking the mean of the tides over a considerable period of time.

In fixing the rule that should be followed in determining the limit of a federal grant, the court used the following language: "In determining the limit of the federal grant, we perceive no justification for taking neap high tides, or the mean of those tides, as the boundary between upland and tideland, and for thus excluding from the shore the land which

is actually covered by the tides most of the time. In order to include the land that is thus covered, it is necessary to take the mean high-tide line, which, as the Circuit Court of Appeals [74 F.2d 901] said, is neither the spring tide nor the neap tide, but a mean of all the high tides. In view of the definition of the mean high tide, as given by the United States Coast and Geodetic Survey, that 'Mean high water at any place is the average height of all the high waters at that place over a considerable period of time,' it appears in that case that the court considered a period of time covering slightly more than eighteen years. It further appears, however, that with the datum plane of the Geodetic Coast Survey being available, the mean high-tide level can be ascertained within the limits of what we may call "reasonable time."

[6,7] From what we have said, it seems to us clear that "ordinary high-water mark" means just as the trial court held, the ascertaining of the mean rise of the tide, and a horizontal line projecting therefrom to the shore, and that the run or wash of the waves, or reach of the water caused by the waves or swell of the ocean, has nothing to do with determining the "ordinary high-water mark," as determined by the rise of the tide. In other words, there is a clear distinction between mere sea water and tide water.

[8] In the instant case it appears that the trial court erred in not taking into consideration all the tides in fixing the actual mean rise thereof. However, as the appellant is not entitled to a reversal of the judgment, and the plaintiff has not appealed from the judgment, and the action is not one to quiet title, we do not find any necessity for remodeling the findings of the trial court and the entering of a corrected judgment. The main issue involved is the one which we have determined, to-wit: The method of determining what is meant by the term "ordinary high-water mark." That being all that is really involved in this appeal, we think the judgment should be affirmed, and it is so ordered.

We concur: PULLEN, P. J.; THOMPSON, J.

25 Cal.App.2d 73

PEOPLE v. VENABLE.

Cr. 3064.

District Court of Appeal, Second District,
Division 2, California.

Feb. 15, 1938.

1. Criminal law ⇐29

A conviction of grand theft for failure to deliver automobile after receipt of price and of forgery in having delivered a forged receipt for payment at time price was received was authorized, notwithstanding that acts allegedly constituted a single transaction.

2. Criminal law ⇐29

A defendant may be convicted of two separate offenses arising out of the same transaction when each offense is stated in a separate count and when the two offenses differ in their necessary elements and one is not included within the other.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Douglas J. Venable was convicted of grand theft and of forgery, and he appeals.

Affirmed.

William J. Clark, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

WOOD, Justice.

Defendant was charged in the information with the crime of grand theft and in a second count with the crime of forgery. At a trial before the court without a jury he was found guilty on both counts. He prosecutes this appeal from the judgment.

On the charge of grand theft it was proved that one M. Farman attempted to purchase an automobile from defendant for the total sum of \$627. She delivered to him part of the purchase price in cash and later gave him a check for \$432. The car was never delivered to her. On the count charging forgery it was established that at the time defendant received the check for \$432 he executed and delivered a forged receipt for \$627.

[1,2] Defendant contends that the prosecution may not charge both grand theft and forgery under the circumstances of the case, arguing that the acts shown

in evidence constituted a single transaction. There is no merit in the contention. The test is the identity of the offenses as distinguished from the identity of the transactions from which they arise. A defendant may be convicted of two separate offenses arising out of the same transaction when each offense is stated in a separate count and when the two offenses differ in their necessary elements and one is not included within the other. *People v. Zimmer*, Cal.App., 73 P.2d 923; *People v. Majors*, 65 Cal. 138, 145, 3 P. 597, 52 Am.Rep. 295; *People v. Bentley*, 77 Cal. 7, 9, 18 P. 799, 11 Am.St.Rep. 225; *People v. Ciulla*, 44 Cal.App. 725, 726, 187 P. 49; *People v. Brannon*, 70 Cal.App. 225, 228, 233 P. 88; *People v. Herbert*, 6 Cal.2d 541, 547, 58 P.2d 909.

The judgment is affirmed.

I concur: CRAIL, P. J.

McCOMB, Justice (concurring).

I concur in the judgment. However, I do not believe the appeal is properly before this court.



25 Cal.App.2d 90

**CARPENTER v. NATIONAL SURETY CO.
et al.**

Civ. 10733.

District Court of Appeal, First District,
Division 2, California.

Feb. 16, 1938.

1. Mechanics' liens ⇐312

The terms of statute authorizing owner of premises to exact bond of contractor are read into bond executed under statute and control its interpretation and effect. Code Civ.Proc. § 1183.

2. Mechanics' liens ⇐315

The surety on a lessee's statutory bond conditioned that building required to be constructed by lessee should be free of liens when completed was liable for unpaid liens against building to lessors which became owners of premises and forfeited lease upon default by lessee, notwithstanding operative clause of bond made surety liable for unpaid liens imposed upon title and interest to and

in leased premises, since under statute that clause was an obligation to protect owner against failure to pay all liens arising out of construction of building. Code Civ.Proc. § 1183.

3. Mechanics' Liens $\Rightarrow$ 317

A statutory bond given by contractor to protect owner against failure to make full payment for all work done and materials furnished in construction of building is a contract of indemnity against liability and not against loss sustained and paid, and hence an owner was not required to show loss before recovery could be had on bond, as against contention that owner had not paid off any unpaid liens and that in all probability liens were unenforceable. Code Civ. Proc. § 1183.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Liquidation proceedings in the matter of the National Surety Company, wherein Samuel L. Carpenter, Jr., as insurance commissioner of the state, was appointed as liquidator to wind up the company's affairs in California, and wherein the Los Angeles Athletic Club and another filed a claim. From a judgment allowing the claim, Samuel L. Carpenter, Jr., as insurance commissioner of the state, appeals.

Affirmed.

Hester W. Webb and Frank L. Guereña, both of San Francisco, for appellant.

Cosgrove & O'Neil and Roscoe C. Andrews, all of Los Angeles, for respondents.

NOURSE, Presiding Justice.

On June 1, 1934, the National Surety Company, a New York corporation, was decreed insolvent by the New York Supreme Court, and the New York superintendent of insurance was appointed liquidator thereof. At that time the company was doing business in California. On July 20, 1934, in a proceeding commenced by the California insurance commissioner under St.1919, p. 265, as amended, Act 3739 (Deering's Gen. Laws), the company was decreed insolvent by the San Francisco Superior Court, and said commissioner was appointed as liquidator to wind up its affairs in this state. The two liquidators entered into a working agreement, approved by the respective courts having jurisdiction of their activities, which agreement included provisions

for the handling of claims filed against the estate of the insolvent company. Los Angeles Athletic Club and Title Insurance Company duly filed with the California liquidator the claim which is the subject of this action. The California liquidator transmitted it to the New York liquidator by whom it was disallowed. Through the California liquidator the claimants were given notice of the disallowance. Under the working agreement between the two liquidators, a determination of the claim in the California proceeding is to be deemed valid in the New York liquidation proceeding. Upon the hearing in the court below, the ruling of the liquidator was disapproved, and judgment was entered allowing the claim, from which judgment the liquidator now prosecutes this appeal.

[1, 2] The facts giving rise to the claim are as follows: The Los Angeles Athletic Club and Title Insurance Company owned certain unimproved real property at Grand avenue and Eighteenth street, Los Angeles. On November 1, 1924, they leased said property to one Danziger and wife, for 25 years at an annual rental of \$25,000, which lease the Danzigers assigned to Olympic Auditorium, Inc. The lease required the lessee to construct on the leased premises an auditorium building of a reasonable value of not less than \$175,000, and the lessee agreed to have the building completed and clear of mechanics' liens, or liability therefor, on or before August 1, 1925. The lease further provided that prior to construction of the building, the lessee should furnish to the lessors a bond in the principal sum of \$100,000, conditioned that the building should be free and clear of liens or claims when completed. Pursuant to this last-mentioned provision, on January 20, 1925, Danziger and National Surety Company, as principals, executed the bond on which the claim, the subject of this action, is made. The building was thereafter constructed. The landowners fully complied with statutory provisions as to posting notice of nonresponsibility. Within due time after completion of the building, certain firms and persons, who had not been compensated for work performed and materials furnished, filed mechanics' liens totaling \$86,488.38, and subsequently commenced an action to foreclose said liens. Thereafter the lessee defaulted in the payment of rent, and the lessors recovered possession of the premises and forfeiture of the lease. Olympic Auditorium, Inc., v. Superior Court, 81 Cal.App. 283, 253 P. 944. Said

lessors have since remained in possession of the land and building as the owners thereof. In the action to foreclose the mechanics' liens, however, it was decreed that the lien claimants were entitled to a "lien upon the Auditorium Building down to the surface of the ground." *English v. Olympic Auditorium, Inc.*, 217 Cal. 631, 644, 20 P.2d 946, 951, 87 A.L.R. 1281.

The lessors served notice upon National Surety Company and National Surety Corporation of the entry of the final judgment establishing the liens, and that said liens were liens in violation of the obligations of the principals of said bond. Demand was made for payment of \$75,000, it having been previously stipulated that the Surety Company's liability upon the bond should be reduced to that amount.

The appellant contends first that, since the operative clause of the bond makes the surety liable only in the event of unpaid liens "imposed upon the title and interest to and in the leased premises," there is no liability for liens which are enforceable against the building alone and not against the respondents' interest in the land. The point is controlled by these principles: The bond is a statutory bond authorized by section 1183 of the Code of Civil Procedure. As such, the terms of the statute are read into the bond and control its interpretation and effect. The Code section provides: "It shall be lawful for the owner to protect himself against any failure of the contractor to perform his contract and make full payment for all work done and materials furnished thereunder by exacting such bond or other security as he may deem necessary." Thus, the operative clause of the bond requiring the surety to pay all liens "imposed upon the title and interest to and in the leased premises" must be read as an obligation to protect the owner against the failure to pay all liens arising out of the construction of the building. Since, through the forfeiture of the lease, the building has become the property of the lessor-owner, the obligation of the surety to protect it against the failure to pay such liens takes full force.

[3] The appellant further contends that the respondent has suffered no damage for which the surety can be held liable because it has not paid off any of the liens and because, in all probability, the liens are incapable of enforcement. The bond is a contract of indemnity against liability and not a contract of indemnity against loss

sustained and paid. Hence, it is not necessary to show loss before recovery can be had on the bond. 23 Cal.Jur. p. 1100; *Ceremony v. Drummond*, 37 Cal.App. 446, 448, 174 P. 696. Furthermore, there is nothing in this record showing that the building cannot be removed from the land upon foreclosure of the liens. If such foreclosure is had and the building moved, it would be because of the liens arising from the construction of the building. It is this happening which the bond was designed to prevent, and it is the failure to pay for the work and materials which has created the liability. The bond was given to "protect" the owner against such failure to "make full payment for all work done and materials furnished." Code Civ.Proc. § 1183.

The judgment is affirmed.

We concur: STURTEVANT, J.;
SPENCE, J.



25 Cal.App.2d 94

NICHOLS v. SMITH, Judge.

Civ. 11616.

District Court of Appeal, Second District,
Division 1, California.

Feb. 16, 1938.

Rehearing Denied March 11, 1938.

Hearing Denied by Supreme Court

April 14, 1938.

1. Exceptions, bill of ☞60(1)

A motion and order to strike out a proposed bill of exceptions will lie in a proper case.

2. Exceptions, bill of ☞53(5)

A writ of mandate to compel settlement of bill of exceptions is not a matter of right, and writ must be refused where proposed bill of exceptions is lacking in essentials.

3. Exceptions, bill of ☞53(7)

A litigant asking for writ of mandate to compel settlement of bill of exceptions must prove that court's order finding that proposed bill is false, fraudulent, and untrue is not correct.

4. Exceptions, bill of ☞53(7)

A writ of mandate would not issue to compel settlement of bill of exceptions where petitioner did not show incorrectness of court's finding that proposed bill was false.

fraudulent, and untrue by bringing forward reporter's notes or other evidence showing the real facts of the case.

5. Exceptions, bill of 51

The duty of trial court considering proposed bill of exceptions is to settle the bill and not to make a bill.

Mandamus proceeding by W. P. Nichols against Lewis Howell Smith, Judge of the Superior Court of the state of California, in and for the county of Los Angeles, to compel the Superior Court to settle a proposed bill of exceptions served and filed by the petitioner. Catherine A. McKenna was substituted as petitioner.

Peremptory writ denied.

Catherine A. McKenna, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and Douglas De Coster, Chief Deputy Co. Counsel, both of Los Angeles, for respondent.

WHITE, Justice.

Petitioner applies for a writ of mandate for the purpose of compelling the respondent superior court to settle a proposed bill of exceptions served and filed by petitioner. The defendants in said action thereupon, after proper notice thereof, moved respondent court to strike said proposed bill of exceptions from its files, upon the numerous grounds set forth in the motion. The motion to strike coming on regularly to be heard was granted by respondent court and the judge thereof.

[1] It is the law that a motion and order to strike a proposed bill of exceptions will lie in a proper case. *Dainty Pretzel Co. v. Superior Court*, 7 Cal.App.2d 437, 45 P.2d 817. The respondent court and judge thereof, considering two proposed bills of exceptions (with one of which we are not here concerned), determined in its order striking the proposed bills of exceptions that the same "are not fair presentations of the evidence received upon the trial"; that the proposed bills "do not speak the truth, and are in many respects false and fraudulent; and that as one illustration of the fraudulent character of the said bills of exceptions, said plaintiff's counsel has incorporated therein a purported quiet title judgment purporting to quiet the title in Catherine A. McKenna some years ago, but has omitted to incorporate therein an order

setting aside said judgment last above referred to." The respondent court and judge thereof further found that the proposed bill of exceptions failed to include all of the evidence received in connection with the mooted issues; and further found that "in order to present fair bills of exceptions, it will be necessary to write entirely new documents and prepare new bills of exceptions." The court further found that petitioner herein had entirely failed to make any corrections in the proposed bill of exceptions, although her attention had been called to the same. The respondent court further found "that there was a large volume of both verbal and documentary evidence offered and received in evidence tending to support the findings of the trial court, all of which has been intentionally omitted from the said purported bills of exceptions and each of them." The trial court also determined that the proposed bill of exceptions was not full nor fair, and that in order for the court to settle a true bill of exceptions, it would be necessary for the court to prepare an entirely new bill, and that a true bill of exceptions could not be settled "merely by suggestion of any reasonable amount of amendments to the proposed bills of exceptions, and each of them, short of preparing an entirely new bill." In its findings the respondent court branded the proposed bill as "a sham and a frivolity, a mere pretense, and a fraud." We have carefully examined the copy of petitioner's proposed bill of exceptions attached to the petition herein, and the same substantially sustains the finding of respondent court and judge thereof in regard thereto.

[2-5] This is not a case where a court or judge has arbitrarily refused to settle a proposed bill of exceptions, but rather one where, after consideration thereof, the same has been deemed so unfair and so lacking in its essentials as to render correction by amendment impossible. Rather than refusing to act, the respondent court herein has, in its discretion, acted, but acted contrary to the wishes of petitioner. It must be remembered that a writ of mandate to compel the settlement of a bill of exceptions is not altogether a matter of right, and where a proposed bill is lacking in the very essentials of a bill of exceptions, the writ will not issue. *Fairbanks, Morse & Co. v. Superior Court*, 90 Cal.App. 410, 265 P. 992; *Dainty Pretzel Co. v. Superior Court*, supra; *Hearst v. Dennison*, 72 Cal. 227, 13 P. 628. The burden is on the person asking

for the writ of mandate to show that the court's order finding that the proposed bill is false, fraudulent, and untrue is not correct, and we have no such showing here. In fact, as heretofore observed, reference to the proposed bill of exceptions as contained in petitioner's application for this writ, and the findings of the trial court, indicate that the instrument submitted fails to show an attempt to present such a fair and bona fide statement of the case as entitles it to be considered and settled as a bill of exceptions. The petitioner herein has failed to meet the burden resting upon an applicant for a writ of mandate by bringing before us the reporter's notes or other evidence of what she contends to be the real facts of the case. The duty of the trial court is to settle the bill, not to make one. *Pacific Land Ass'n v. Hunt*, 105 Cal. 202, 38 P. 635; *Hearst v. Dennison*, supra.

For the foregoing reasons, the alternative writ heretofore issued is discharged, and the peremptory writ denied.

We concur: YORK, P. J.; DORAN, J.



25 Cal.App.2d 97

NICHOLS v. BUSING et al.

Civ. 11615.

District Court of Appeal, Second District,
Division 1, California.

Feb. 16, 1938.

Hearing Denied by Supreme Court
April 14, 1938.

Appeal and error — 554(2)

Where writ of mandate to compel court to settle proposed bill of exceptions was denied and there were no proceedings pending in trial court for transcript or bill of exceptions and the time for initiating such proceedings had expired, appeal would be dismissed.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by W. P. Nichols against H. B. Busing, as administrator of the estate of Louie S. Dexter, deceased, and others, wherein Catherine A. McKenna was substituted as plaintiff. From a judgment, the plaintiff appeals.

Appeal dismissed.

Catherine A. McKenna, of Los Angeles, for appellant.

Edwin J. Miller, of Los Angeles, for respondents H. B. Busing, Adm'r of Estate of Louie S. Dexter, deceased; Edwin J. Miller and Catherine O'Donnell.

WHITE, Justice.

This is an appeal by plaintiff from a judgment entered on or about June 2, 1937. Defendants moved to dismiss said appeal on the ground that appellant has taken no proceedings to perfect the same. Appellant opposes the motion on the ground that the trial court has refused to settle her proposed bill of exceptions, and that she now has pending in this court an alternative writ of mandate to compel the superior court to settle said proposed bill of exceptions, which the trial court struck from the files on the ground that the proposed bill as presented did not recite the truth and for numerous other reasons set forth in the trial court's order.

We have this day filed an opinion and order in the aforesaid mandate proceeding, *Nichols v. Smith*, Judge of Superior Court, 76 P.2d 525, discharging the alternative writ issued therein and denying a peremptory writ; and the certificate of the county clerk shows that there are now no proceedings pending in the court below either for a transcript or a bill of exceptions, and the record shows that the time for initiating such proceedings has long since expired.

It therefore follows that the appeal herein should be dismissed, and it is so ordered.

We concur: YORK, P. J.; DORAN, J.

HINKLE et al. v. SOUTHERN PAC. CO.
et al.*
Civ. 5896.

District Court of Appeal, Third District,
 California.

Feb. 14, 1938.

Hearing Granted by Supreme Court
 April 14, 1938.

1. Railroads ⚡350(13, 21)

Whether motorist and guest were contributorily negligent so as to preclude their recovery for injuries sustained in collision with freight train backing over crossing in nighttime was for jury.

2. Master and servant ⚡333

In action for injuries sustained by motorist and guest in collision with train brought against railroad and operators of train, verdict against the railroad only exonerated the railroad from any negligence in operation of train.

3. Trial ⚡243

In action against railroad for injuries sustained by motorist and guest in collision with train, instruction relating to necessity of maintaining a flagman or automatic wig-wag device at crossing, which first informed jury that they could not find the railroad negligent under certain facts, and then informed them that they could, was contradictory and erroneous.

4. Appeal and error ⚡1066

An instruction submitting issues of railroad's negligence in not maintaining at crossing an automatic wigwag device, a flagman, or a flagman with a red instead of a white lantern, when complaint was based on negligent operation of train only and case was tried on that theory, motorist and guest were familiar with crossing, and there was no evidence that crossing was extra-hazardous or that traffic in nighttime was heavy, was prejudicially erroneous.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action by Bliss I. Hinkle and another against the Southern Pacific Company and others for injuries sustained in a collision between an automobile in which the plaintiffs were riding and a train of the named defendant. From a judgment for the plaintiffs against the named defendant only, the named defendant appeals.

Reversed.

T. L. Chamberlain, of Auburn, and Devlin & Devlin & Diepenbrock and Horace B. Wulff, all of Sacramento, for appellant.

Lowell Sparks, of Auburn, and Robert E. Burns and P. J. Murphy, both of San Francisco, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The respondents had judgment against the Southern Pacific Company, a corporation, for personal injuries alleged to have been suffered by them in a collision which occurred between an automobile in which they were riding and a train operated by the agents and employees of the Southern Pacific Company, in the county of Placer, on or about the 31st day of July, 1935. From this judgment the Southern Pacific Company, a corporation, appeals.

The complaint charges negligence in the following language:

"That on the 31st day of July, 1935, at or about the hour of 10:20 o'clock P. M. of said day, and while the plaintiff Bliss I. Hinkle, was being driven in an automobile in a general southerly direction along and upon said State Highway Number 89, and when at a point where said Highway Number 89 crosses the railroad tracks hereinabove referred to, said defendants, and each of them, so negligently operated, conducted and ran a certain train owned by the defendant, Southern Pacific Company, a corporation, in a generally easterly direction, over and along said railroad tracks so as to cause it to, and it did, at said time and place aforesaid, collide with the automobile in which plaintiff Bliss I. Hinkle, was being driven, as aforesaid, thereby causing said plaintiff, Bliss I. Hinkle, to be, and she was cut, bruised, lacerated, shocked and injured," etc. The complaint contains a like count as to the plaintiff George H. Hinkle.

No other acts of negligence are charged in the complaint, and, so far as the complaint is concerned, the negligence alleged is confined to the operation of the train. The verdict of the jury was against the company only.

The record shows that on the night of July 31, 1935, at about the hour of 10:20, at a place about one-quarter of a mile west of Tahoe Tavern, the railroad owned by the Southern Pacific Company, and upon which it operates trains, crosses or intersects highway No. 89. The railway runs

*For subsequent opinion see 87 P.2d 349.

in a generally westerly and easterly direction. Highway No. 89 extends in a northerly and southerly direction. At the time of the collision, the respondents were operating a Ford sedan and were traveling in a general southerly direction. The driver of the automobile was George H. Hinkle, the husband of Bliss I. Hinkle. The train operated by the agents of the Southern Pacific Company was composed of a box car, oil tank car, and an engine, and was being backed in an easterly direction toward the tavern just mentioned. Approaching the highway the oil tank car was the lead car of the train; then came the box car, the tender of the engine, and then the engine. The engine itself was facing westerly. The automobile was struck by the coupler of the oil tank car, moved several feet, and in this collision the plaintiffs were injured. There was no overhead light at the crossing, and no automatic wigwag. The testimony of the plaintiffs is to the effect that as they approached the crossing (which, by the way, is a crossing over a portion of the railroad yards maintained by the company) they paused or stopped their automobile and looked for any approaching train, saw nothing, and heard nothing. Previously to this the respondents had attempted to cross the same railroad track at a point nearer the Tahoe Tavern, but found the same obstructed by a train which was made up, scheduled to leave the tavern at about 10:30 p. m., and, desiring not to be delayed in reaching the point of their destination, they traveled about two-tenths of a mile to the crossing in question.

On the part of the company, two brakemen, the fireman and the conductor testified that the usual crossing whistle had been given; that the bell was continuously rung; that there were several lights on the engine; and the two brakemen testified that they were stationed upon the tank car, each one carrying a lighted white lantern; that, as the train approached the crossing, it slowed down to a speed of about four miles per hour; that one of the brakemen jumped off of the tank car, ran ahead of the train to the crossing in order to protect the same from automobiles or pedestrians.

It appears from the testimony that after the automobile had stopped at a point several feet from the main line on which the train was being operated, or backed, it immediately started forward at a speed of about ten miles per hour. The brakeman,

who testified that he had gone forward to the crossing, testified that he had to jump out of the way to avoid being struck by the advancing automobile. The respondents testified that they did not see any brakeman there at the crossing.

After the collision, two witnesses testified that the radio in the automobile was going. The respondents testified that they had not started the radio preceding the collision. The testimony is all to the effect that it was a quiet evening, no wind blowing, rather warm, and that there were no disturbing noises. One of the plaintiffs testified that the night was quite dark. The photographs introduced as exhibits show that there are a number of pine trees along the railroad right of way. There is testimony in the record, however, that a train traveling at the time named, and under the conditions shown by the record, could have been seen for several hundred feet. The respondents were not expecting a train from the west, but were looking for, and expecting that the train which they had seen at the tavern would be moving westerly near the time they were approaching the crossing.

The record shows that two trains were operated upon the railroad in question, daily, one arriving early in the morning, and the other departing shortly after 10 o'clock in the evening. The train so operated was what is known as and called a "mixed train," hauling both freight and passenger cars.

Upon this appeal it is contended, first, that the respondents were guilty of negligence as a matter of law; and, second, that the court permitted the jury to find a verdict against the appellant upon issues not raised by the pleadings, and not supported by any theory upon which the cause was tried.

[1,2] While the preponderance of the testimony in the record is to effect that the crossing whistle was sounded, that the bell on the engine was continuously rung, that the train slowed down to a speed of about four miles per hour, that a brakeman ran ahead of the backing train to the crossing, carrying a lighted white lantern, and that the lights on the train could have been seen by the respondents before venturing upon the crossing, had they really stopped, looked, and listened, yet there is negative testimony to the effect that no whistle was heard, that no bell was rung, that no lights were seen upon the train,

that no lights were seen upon the leading tank car, and that no light was seen upon the crossing; that the trees along the right of way of the railroad cast some shadows so as to obscure the view of the backing train. Without going into this testimony in further detail, we may state it is sufficient to show that this court, upon appeal, is not warranted in holding that the plaintiffs were guilty of contributory negligence as a matter of law. The jury having found a verdict against the company only, and not against the agents and operators of the train, it follows as a matter of course that the jury did not base its verdict in favor of the plaintiffs upon any negligence in the operation of the train, but upon other causes which we will further consider. Before doing so we will again call attention to the charging part of the complaint, basing the cause of action purely upon the negligent manner of operating the train.

On the part of the appellant it is claimed that that is the exclusive theory upon which the cause was tried, and upon the part of the respondents, that the theory upon which the cause was tried included, also, negligence as to the actions taken, or lack of precaution taken to safeguard the crossing where the collision occurred. A reading of the transcript convinces us, however, that the appellant's theory is correct, and, while the testimony in the record, and the photographs introduced show the physical appearance of the crossing, the cause was not tried or based upon such facts.

The second contention of the appellant appears to be well taken, as at the conclusion of the trial the court, of its own motion, gave to the jury the following instruction: "You are instructed that although as a matter of law the defendant was not required to equip its employees with a red lantern for the purpose of signaling the approach of a train at a highway grade crossing, and although in this action you cannot find the defendants guilty of negligence because of the absence from the crossing of an automatic signaling device to warn travelers upon the highway of the approach of a train, and also, although the law does not require the defendants to have any light on the forward end of the lead car in any switching movement within the yard limits, and it is not negligence to make such a movement without a light on the forward end of the lead car, nevertheless, if

from a consideration of all the facts and circumstances of this case you find from the evidence that at the time and place referred to in plaintiffs' complaint and in the evidence an ordinarily prudent person would have maintained a person with a red lantern, would have furnished an automatic signaling device, or would have had on the forward end of the lead car in such switching movement within the yard limits, or would have maintained a flagman, or would have rung a bell, or sounded a whistle, or either one or more thereof, at or near the crossing, to warn travelers of the approach of said train to said crossing, and you further find that the Southern Pacific Company, a corporation, through its agents and servants acting in the discharge of their duties and within the scope of their authority, did not furnish and maintain the same, and that by reason thereof, the plaintiffs were injured, then and in that event I instruct you, the defendant Southern Pacific Company, was guilty of negligence."

By giving this instruction the court first advised the jury that they could not find the defendants guilty of negligence because of the absence from the crossing of an automatic signal device. The court also instructed the jury that it was not negligence for the defendants not to have any light on the forward end of the lead car in any switching movement within the yard limits.

The court likewise instructed the jury that the law did not require the company to equip its employees with a red lantern, and then, after instructing the jury that it could not find the defendants guilty because of the absence from the crossing of an automatic signal device, the court proceeded to instruct the jury that if, in their opinion, a reasonable person would have so protected the crossing by an automatic signal device, then and in that case they could find a verdict against the company. The court also instructed the jury that if, in their opinion, an ordinarily prudent person would have maintained, at the crossing, a person with a red lantern, they could find against the defendant. The court further instructed the jury that, if they found that an ordinarily prudent person would have had a light on the forward end of the lead car in such switching movement, again, a verdict might be rendered against the defendant company. The court likewise instructed the jury that, if they found that an ordinarily prudent

person would have rung a bell or sounded a whistle or maintained a flagman, or either one or more thereof, at or near the crossing, and if they further found that the Southern Pacific Company, through its agents and servants, in the discharge of their duties, and within the scope of their authority, did not furnish and maintain the same, and that by reason thereof the plaintiffs were injured, a verdict might be rendered against the company.

Several issues are here presented for the consideration of the jury which were not included within the pleadings, and several reasons pointed out upon which the jury might base its verdict. In submitting these issues to the jury no standard was set for determining the necessity of maintaining an automatic signal device, nor anything shown necessitating the equipping of the flagman with a red lantern instead of a white lantern, or of maintaining a flagman at said crossing. There does not appear to be any testimony in the record indicating that the crossing in question was either specially or peculiarly hazardous, but the crossing could at all times, whether in daytime or nighttime, be readily observed.

[3] We might further call attention to the contradictory and conflicting character of the instruction which first tells the jury that they cannot do a certain thing, and thereafter informs the jury that they may take the action which they have just been advised that they cannot do.

A somewhat similar question was presented in the case of *Young v. Southern Pacific Company*, 182 Cal. 369, 190 P. 36, 41, the court instructed the jury as follows: "The jury is instructed that if under the circumstances existing at a crossing proper warning of the danger of the approach of trains cannot be given unless some one is stationed thereat to give warnings, it is the duty of a railroad company making use of the crossing to have some one stationed at the crossing to give such warnings, or to approach such crossing with the engine under such control that it can be stopped in time to avoid injury."

This instruction was held erroneous. The court in so doing used the following language: "Aside from the proposition that this instruction submitted to the jury, without any standard for the determination of the same, the question of what constituted 'proper warning' of the danger

of the approaching train, the instruction was objectionable because the complaint did not allege the failure to have a flagman at the crossing as a basis of the claim of negligence. The instruction should not have been given."

In *Green v. Southern Pacific Company*, 53 Cal.App. 194, 199 P. 1059, 1062, exactly the same question which we are considering as to issues was presented and passed upon by the court. There, the court allowed an amendment to the complaint so as to clearly present the question as to the negligence of the company relative to the precautionary measures taken to safeguard the crossing. Also, the question as to the verdict exonerating the trainman from negligence, establishing the fact that the jury had found its verdict upon other issues. In that case it further appears that negligence was charged in general terms, and, with the amendment of the complaint, was not based solely upon the operation of the train. This appears from the following language found in the opinion in that case, to wit:

"We have noted the fact that defendant's engineer, Brown, was a codefendant in this action. Upon these facts appellant suggests that because Brown was its agent appellant is exonerated by the verdict in favor of the agent. In *Bradley v. Rosenthal*, 154 Cal. 420, 425, 97 P. 875, 129 Am.St.Rep. 171, it was decided that where recovery is sought, based upon the act or omission of an agent whom a principal did not direct and in which the principal did not participate, and where thus his responsibility is simply the responsibility cast upon him by law by reason of his relationship to his agent, the effect of the judgment in favor of and exonerating the agent is such that the principal is thereby relieved of responsibility. See, also, *Fimple v. Southern Pac. Co.*, 38 Cal.App. 727, 177 P. 871. So, in the case at bar, if the claim of negligence as charged against appellant arose solely from the conduct of the engineer, in the operation of the engine and cars, without express instructions of appellant governing the particular manner of running the train, and without other acts of negligence on the part of appellant, a verdict and judgment in favor of the engineer would relieve appellant from liability for such alleged negligence.

"The complaint, as amended at the trial, contains the allegation that, prior to the

time when said freight car came in contact with the deceased, the defendant corporation carelessly and negligently failed and neglected to place or maintain any flagman or signalman, or any other person or persons, or to show or give any signal or signals whatever, at or near said Osos street, or on or near said gondola freight car, to warn or notify pedestrians, or other persons, crossing or about to cross said tracks of defendant corporation on said Osos street, of the approach of said gondola freight car and said locomotive. The evidence amply proved the truth of that allegation. That charge of negligence presented one of the issues which was submitted to the jury."

In this particular our attention is called to the case of *Bush v. Southern Pacific Co.*, 106 Cal.App. 101, 289 P. 190, where an instruction was given to the effect that the jury might consider the absence of a flagman or absence of an automatic device to warn of the approach of a train, as supporting the instruction given in the instant case. On the part of the appellant it is contended that paragraph VIII of the complaint in that case alleged that the Southern Pacific Company carelessly and negligently failed and neglected to place or maintain, or cause to be placed or maintained, any flagman or signalman, or any other person or persons, to show or give on said road to warn or notify automobile drivers of the existing presence or location of said crossing. The opinion, as reported, is silent as to the pleadings involved in that action, and therefore it cannot be held as authorizing the giving of the challenged instruction. If the complaint contained the allegations as set forth by the appellant, the issue relative to the maintenance of the crossing was then squarely presented to the jury for its consideration.

In the case of *Grand Trunk R. Co. v. Albert Ives*, 144 U.S. 408, 12 S.Ct. 679, 684, 36 L.Ed. 485, considering the question of maintaining a flagman or an automatic device to warn of the existence of a railroad crossing, the court states that, before such question should be submitted to the jury, the evidence should show the hazardous character of the crossing. The language of the court is as follows:

"It seems, however, that before a jury will be warranted in saying, in the absence of any statutory direction to that effect, that a railroad company should keep a

flagman or gates at a crossing, it must be first shown that such crossing is more than ordinarily hazardous; as, for instance, that it is in a thickly populated portion of a town or city; or that the view of the track is obstructed either by the company itself, or by other objects proper in themselves; or that the crossing is a much traveled one, and the noise of approaching trains is rendered indistinct, and the ordinary signals difficult to be heard, by reason of bustle and confusion incident to railway or other business; or by reason of some such like cause; and that a jury would not be warranted in saying that a railroad company should maintain those extra precautions at ordinary crossings in the country"—citing a number of authorities.

In the instant case the record shows that the plaintiffs were familiar with the crossing in question.

In *Cummings v. Pennsylvania Ry. Co.*, 301 Pa. 39, 151 A. 590, 71 A.L.R. 1156, the Supreme Court of Pennsylvania held that there is no common-law duty on the part of a railway company to place a flagman or safety gates at a crossing. Quoting from the syllabus, it appears that the court gave an instruction in substance as follows, which was held erroneous: "An instruction in an action for the death of one killed at a railroad crossing, that, even though warning signals were given by the approaching train, yet if, under the particular circumstances of the case, the jury should find that the public safety was not reasonably secured at the crossing by reason of the absence of a watchman or gates, they might still find that the defendant was negligent, is erroneous as permitting the jury to find negligence from the absence of a watchman or safety gates alone."

In the case of *Tonning v. Northern Pacific Ry. Co. et al.*, 180 Wash. 374, 39 P.2d 1002, the Supreme Court of Washington held that the waving of a white lantern instead of a red one at a crossing was sufficient warning that danger from an approaching train was imminent, to a motorist accustomed to using the crossing in question. In the case before us the instruction authorized the jury to find a verdict against the company if, in their opinion, a red light instead of a white light should have been used, by holding that, in the absence of a red light, the company might be held negligent.

In *Rohthstein v. Boston & Maine R. R.*, 2 N.E.2d 205, 208, the Supreme Court of Massachusetts thus considers the question of the color of the lantern waved, and, referring to a former case, said: "The evidence that he waved a white lantern instead of a red one is immaterial in the absence of any evidence that a white lantern was ever used by the defendant's employees to invite travelers to cross tracks, or that the plaintiff's intestate had any reason to treat it as an invitation to pass over the crossing"—citing a number of cases.

While there is some evidence in the record that highway No. 89 carries considerable traffic, there is no testimony in the record that there were any extra hazards connected with the crossing in question, or that the traffic using said crossing or said highway at nighttime is at all heavy.

[4] Other cases might be cited to the effect that the crossing where an accident occurs must be shown to have some extra hazard before a railroad company is under the necessity of maintaining a flagman or automatic wigwag device, before such question should be submitted to the jury outside of the pleadings and of the cause as tried, and allowed the jury to find a verdict without any supporting testimony. It is needless to add that such procedure was prejudicial.

The judgment is reversed.

We concur: PULLEN, P. J.; THOMPSON, J.



5 Cal.App.2d 85

MAZZA v. AUSTIN, Superior Judge et al.
Civ. 10696.

District Court of Appeal, First District,
Division 2, California.
Feb. 16, 1938.

1. Executors and administrators ⌘269

The proof of mailing of notice of hearing on petition to compromise claims against an estate need not be made by affidavit. Probate Code, § 1200, as amended by St. 1933, p. 2491.

2. Executors and administrators ⌘269

Where judgment roll contains nothing to show that required proof of mailing of

notice of hearing on petition to compromise claims against an estate was not made, recital in judgment that notice of hearing was given and that notice was due, proper, and sufficient is conclusive that proof of mailing was made. Probate Code, § 1200, as amended by St.1933, p. 2491.

3. Statutes ⌘205, 206

A statute must be looked at in its entirety to determine the legislative intent, and effect given to all its parts.

4. Executors and administrators ⌘87

Under statute, the probate court may authorize a compromise of a debt due the estate of a decedent only upon petition by the executor or administrator seeking such authorization. Probate Code, § 578, as amended by St.1935, p. 1971.

5. Executors and administrators ⌘269

The probate court may not direct a compromise of a claim against an estate, although it has power to authorize such a compromise. Probate Code, § 578, as amended by St.1935, p. 1971.

6. Executors and administrators ⌘269

A statute stating that a compromise of a claim against an estate "may" be authorized by the probate court was interpreted as permissive rather than mandatory. Probate Code, § 578, as amended by St.1935, p. 1971.

[Ed. Note.—For other definitions of "May," see Words & Phrases.]

7. Executors and administrators ⌘87

The debtor of an estate may not petition the probate court in which the estate is pending for an order authorizing and directing a compromise of the petitioning debtor's obligation, over the objection of the executor or administrator. Probate Code, § 578, as amended by St.1935, p. 1971.

8. Executors and administrators ⌘269

An order authorizing and directing executrix over her objection to compromise claims against estate was void. Probate Code, § 578, as amended by St.1935, p. 1971.

Writ of review to Superior Court, Fresno County; H. Z. Austin, Judge.

Proceeding by Maddalena Mazza, executrix of the estate of Mary Tunzi, deceased, petitioner, against H. Z. Austin, as judge of, and the Superior Court of the State of California in and for Fresno

County, in Department No. 3 thereof, in probate, for a writ of review, wherein petitioner sought to annul an order of the court directing petitioner to compromise certain claims against the estate.

Petition granted.

John D. Chinello and Rae B. Carter, both of Fresno, for petitioner.

Robert M. Thomas, of Fresno, for respondents.

NOURSE, Presiding Justice.

Writ of review. Petitioner, as executrix of the estate of Mary Tunzi, seeks to annul an order of respondent court by which petitioner was "authorized and directed" to compromise certain claims of the estate against George Cerini, Mary Allison, D. R. Owen, and the estate of John Cerini, all debtors of the estate of Mary Tunzi.

From the return, it appears that on June 21, 1937, the above-named debtors of the estate of Mary Tunzi filed a petition in respondent court in which they recited that they owed certain sums of money to the estate of Mary Tunzi, that said sums cannot be paid in full, and praying that petitioner, as executrix of the estate of Mary Tunzi, be authorized and directed to accept certain offers of compromise stated in the petition. On July 2, 1937, respondent court made its order by which petitioner was authorized and directed to compromise the claims, and by which Wm. B. Johnston was appointed as a commissioner of said court and directed to perform said order if the executrix failed to perform said order within ten days of service of a copy of the order upon her. The order was served the same day and petitioner has not performed said order. On the contrary, petitioner caused to be filed on October 13, 1937, a petition seeking an order setting aside the prior order of the court authorizing the compromise. Said petition was denied October 29, 1937.

No appeal was taken from either of these orders. Petitioner filed with the Supreme Court her petition for a writ of review on November 10, 1937. The alternative writ was issued on the same day and the cause transferred to this court for disposition.

[1,2] Petitioner urges that no notice of the hearing of the petition to compromise was mailed to petitioner within two days after the filing of said petition as required

by section 1200 of the Probate Code, as amended by St. 1933, p. 2491. In the order authorizing compromise, it is recited as follows: "It appearing that due notice of this hearing has been given as required by law. * * *" There is nothing in the return to contradict said recital. The return does not contain any affidavit of mailing of the notice of hearing, but there is no requirement that proof of mailing be made by affidavit. In a similar case, *In re Estate of Dam*, 126 Cal.App. 70, 14 P.2d 162, 163, it was expressly held that proof of mailing of a notice of hearing need not be made by affidavit, and, where the judgment roll contains nothing which shows that the required proof of mailing was not made, the recital of the judgment, "that notice of the hearing has been given as required by the order of this court and by law, and that said notice is in all respects due, proper and sufficient," is conclusive that proof of mailing was made.

[3,4] The important question presented by this proceeding is whether the debtor of an estate may petition the probate court in which the estate is pending for an order authorizing and directing a compromise of the petitioning debtor's obligation. The power of the court to authorize a compromise is derived solely from section 578 of the Probate Code, as amended by St. 1935, p. 1971, which reads as follows: "If a debtor of the decedent is unable to pay all his debts, the executor or administrator, with the approval of the court, may give him a discharge, upon such terms as may appear to the court to be for the best interest of the estate. *A compromise may also be authorized by the court when it appears to be just and for the best interest of the estate.* The court may also authorize the executor or administrator on such terms and conditions as may be approved by it to extend or renew, or in any manner modify the terms of, any obligation owing to or running in favor of the decedent or his estate. *To obtain such approval or authorization, the executor or administrator shall file a verified petition with the clerk showing the advantage of the settlement, compromise, extension, renewal or modification.* The clerk shall set the petition for hearing by the court and notice thereof shall be given for the period and in the manner required by section 1200 of this code." (Italics added.) Respondent stresses the first italicized sentence and argues that, since

the power is not restricted by the Code, and since a debtor of the estate is not a stranger to the estate, the debtor may petition for an order authorizing and directing a compromise. In so arguing, respondent is asking us to take one sentence of the section and construe it separately. This we cannot do. In determining the legislative intent, we must look at the entire section and give effect to all its parts. If the first italicized sentence controls, what effect is to be given to the second italicized sentence? In the first three sentences of the section, the Legislature has defined the power of the court, while in the last two sentences, it has specified the procedure by which such power may be invoked. When the section is so read, it becomes apparent that the court may authorize a compromise of a debt due the estate of a decedent, only upon petition by the executor or administrator seeking such authorization. They are the only persons who may petition the court for such authorization.

[5,6] But, aside from the question of procedure, it has been held directly that the probate court has no power to direct or compel a compromise, and this is the effect of the order here under consideration. In *McPike v. Superior Court*, 220 Cal. 254, 257, 30 P.2d 17, 18, it was said:

"The probate court has the power to authorize the compromise of an adverse claim of a third party to the property of an estate. Prob.Code, § 578, formerly Code Civ.Proc. § 1588, as construed in *Merrill v. Bachelder*, 123 Cal. 674, 676, 56 P. 618. The precise language of that Code section is: 'A compromise may also be authorized by the court or judge when it appears to be just and for the best interest of the estate.'

"Nowhere in express terms is the probate court given the power, sought to be exercised by the order here under attack, of compelling the administrator to carry out and perform the provisions of a compromise so authorized." On page 258 of 220 Cal., on page 18 of 30 P.2d, same case, the court said further: "The language of the statute is permissive, and not mandatory: 'A compromise may also be authorized by the court.' In this connection it is worthy of note that in other proceedings where it was the purpose of the Legislature to make the action of the administrator mandatory and subject to the order of the court in dealings with

strangers to the estate appropriate language is used to indicate that intention."

[7] This holding is in harmony with what we have heretofore said as to the right of the executor, or administrator, alone to petition for leave to compromise. As they cannot be compelled to compromise, even on their own petition, it is manifest that a debtor may not petition for an order directing a compromise over the objection of the executor or administrator.

[8] For these reasons we conclude that the probate court was without jurisdiction to entertain the debtors' petition, and that the order authorizing and directing the executrix to compromise the claims was void. All proceedings had under this order were likewise void, and they do not affect the rights of the parties.

The order is annulled.

We concur: STURTEVANT, J.;
SPENCE, J.



24 Cal.App.2d 718

MONIZ v. BETTENCOURT et al.

MONIZ et al. v. SAME.

Civ. 5879, 5880.

District Court of Appeal, Third District,
California.

Feb. 5, 1938.

1. Automobiles ⇨249

The liability of owner of semitrailer truck for damages arising out of collision occurring while truck was leased to third person was limited under statute to \$10,000 where more than one person was injured. St.1935, p. 153, § 402(b).

2. Trial ⇨108½

In action for damages sustained when automobile collided with semitrailer truck, plaintiffs' questioning, in good faith, of prospective jurors as to whether the latter were interested financially in any insurance company writing liability insurance, was not error.

3. Evidence ⇨558(7)

In action for damages sustained when automobile collided with semitrailer truck, plaintiffs' cross-examination of civil engi-

neer, as to who requested the engineer to take measurements at scene of collision and as to the interest of the person making the request, and engineer's reply that attorney for insurance company had employed engineer to meet with representative of insurance company and go to scene of accident to take measurements, was not error.

4. Trial ☞127

Facts tending to show interest, bias, or motive on part of witness, can always be brought out on cross-examination, even though it may thereby be disclosed that defendant was protected by insurance.

5. Automobiles ☞244(10)

Evidence held sufficient to warrant recovery for damages for death of one occupant and personal injuries sustained by other occupants of automobile which collided with approaching semitrailer truck on ground that part of truck was to left of center line when collision occurred.

6. Evidence ☞527

Courts look with disfavor upon expert testimony reconstructing automobile collision from physical and mathematical facts on ground that complete knowledge of exact speed, course of wind, and force of impact, is impossible, and that reaction of human mind under a certain set of circumstances cannot be established.

7. Evidence ☞527

In action for damages sustained when automobile collided with approaching semitrailer truck, exclusion of expert testimony reconstructing collision from physical and mathematical facts was not error where many of the physical and mathematical facts were given in evidence and in the instructions of the court, and counsel fully discussed such elements in their argument.

8. Appeal and error ☞1046(5)

In action for death of a mother, court's question as to effect of mother's death upon her child was not prejudicial, notwithstanding that court stated in overruling objection to question that damages included child's grief for loss of mother, where reply showed that child was not so much grief stricken as that it missed the mother's care and comfort during the night, and court set forth fully and correctly all the elements of damage that could be considered by jury.

9. Appeal and error ☞301

The point that verdict is excessive should be raised in motion for new trial.

10. Death ☞99(4)

\$16,555 for death of 33 year old woman with life expectancy of more than 30 years was not excessive where woman was in good health and did all the housework and helped with the work on the ranch and left a husband aged 35, and two sons aged 10 and 6.

11. Damages ☞132(8)

\$10,000 to 35 year old father with life expectancy of more than 30 years and with two motherless sons age 10 and 6, for injuries consisting of infected wounds upon the head and face, fractured arm resulting in permanent disability, injury to nerve of lip depriving the latter of feeling, and an injury to chest causing a pulmonary abscess, was not excessive.

12. Damages ☞132(3)

\$5,000 to 6 year old boy for disfiguring facial scars, drooping eyelid caused by injury to nerve controlling eyelid, injury to frontal sinus, and injury to nose which could be corrected only by expensive surgical operation, was not excessive.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action for damages arising out of automobile accident by Alexandrino Moniz, as administrator of the estate of Edith Moniz, deceased, and by Alexandrino Moniz and others against J. M. Bettencourt and another, copartners doing business under the firm name and style of Bettencourt & Warren, and others. From the judgments, the defendants appeal.

Judgments partly affirmed, and partly affirmed as reduced.

Hawkins & Hawkins, of Modesto, and H. K. Landram, of Merced, for appellants.

F. M. Ostrander, of Merced, and D. Oliver Germino, of Los Banos, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This appeal is from two judgments based upon verdicts rendered by a jury impaneled to try the two cases which were consolidated for that purpose. Both cases arose out of the same automobile accident.

In the case of Moniz, as administrator of the estate of Edith Moniz, deceased, against the appellants, the administrator

sought to recover damages upon behalf of the heirs of Edith Moniz.

In the second case Moniz sued in his own right, and as guardian ad litem for his two minor sons. After a trial by jury a verdict was rendered in the action by Moniz, as administrator, in the sum of \$16,555, and in the second action returned a verdict for Alexandrino Moniz in the sum of \$10,000; for Chester Moniz, \$5,000, and for Anthony Moniz, \$180. These judgments were against all of the defendants, including J. M. Bettencourt.

The facts out of which these actions arose are as follows:

About 11 o'clock in the evening of July 1, 1936, LaVerne Mendonca, one of the defendants herein, was an employee of E. Guy Warren, doing business under the name of Bettencourt & Warren. At that time Mendonca was driving a semitrailer, north on the highway between Los Banos and Gustine. The truck was owned by Bettencourt but was being operated under lease to Warren. The highway was a part of the state system and was paved with a 16-foot strip of concrete with shoulders 2 or 3 feet wide on each side of the concrete, with a white stripe down the center of the concrete slab.

Respondent Moniz, his wife, and two children were, at that time and place, riding as guests of Joe V. Coehlo, in an automobile driven by Coehlo, southerly along said highway. The automobile and truck met upon the highway, and after passing the front end of the truck the two vehicles collided, the point of impact being some 16 feet back of the front portion of the trailer. As a result of this collision, all of the occupants of the automobile, some eight in number, were either killed or injured.

The truck was of a type known as a semitrailer. The motive unit had two front wheels to which was attached the steering apparatus. It was driven by dual wheels corresponding to the rear wheels of an automobile. Between these drive wheels was a pivot, upon which rested the front part of the body of the trailer. The rear end of this body was supported by two pair of dual wheels. The truck was somewhat less than 33 feet in length and the tractor portion of the trailer was approximately 15 feet long. It was 72 inches between the outer edges of the two front wheels and 87 inches between the outer edges of the dual drivers. The bed of the

trailer was approximately 96 inches in width.

The Studebaker first struck the semitrailer at an angle ahead of the driving duals, forcing those wheels back so they rubbed upon the spring. It then continued on and struck just in front of the two rear dual wheels on the rear of the trailer, forcing them out of line.

At the time of the accident the truck was loaded with sacked wheat, some of which were torn open by the impact, and the wheat strewn over the roadway. Marks were found upon the highway where the wheels of the trailer had run over the wheat, leaving white marks upon the concrete, which were later referred to by the various witnesses in fixing the point of impact. These white marks commenced at a point about 16 inches west of the center line of the highway, and ran northeasterly some 80 feet to a point near the east side of the road, where the truck came to rest.

The driver of the Studebaker was dead at the time of the trial, but Domingos Coehlo, his brother, testified he was sitting in the front seat beside his brother, and that he observed that the driver of the Studebaker was on the proper side of the highway as indicated by the white line, but he could not say how far. He saw the truck approaching and thought the Studebaker passed the fender and came in contact with the body of the truck. At the time of the collision, he testified, the Studebaker was traveling about 35 or 40 miles an hour. Other passengers in the car testified to the same effect.

Officer Nicholson, of the state highway police, described the highway at the point of the collision, and testified the driver of the truck admitted to him that the inner duals on the left side of his truck were on the white line; and that the inner duals were in line with the center of the front tires before the accident. The statement of the driver of the truck was also taken by the district attorney, to whom he stated that he had all of his wheels on the highway, the front wheels inside of the white line, and, as to the dual wheels, one was on one side of the line and one on the other side. He also testified that he saw the Studebaker approaching, and also saw a milk truck about to enter the highway from a side road; he did not pull over to the right when he saw the Studebaker approaching because at that instant he had his eyes on the milk truck

about to enter the highway, and, before he could change his course, the collision occurred.

This driver and truck left Hayward about 4 o'clock in the afternoon preceding the accident with a load which he delivered at Coalinga the next morning; he unloaded at Coalinga and then took on a load of grain and drove to Firebaugh. He left Firebaugh just before dark on the evening of the accident, stopping in Los Banos for fuel. The driver had not removed his clothes since leaving Hayward, and his rest consisted of periods when he would stop along the highway for that purpose.

[1] In support of the contention of appellants that the court erred in the judgments rendered, they allege first, that the liability of an owner for imputed negligence under section 402 (b) of the Vehicle Code, St.1935, p. 153, is limited to \$5,000 for the death or injury for one person in any one accident, and \$10,000 for more than one person. Respondents concede this, and that the judgments in these cases against J. M. Bettencourt should be limited, in the case of Moniz, as administrator, to the sum of \$5,000, and in the second case to the sum of \$5,000, and accordingly the judgments must be reduced to those amounts as against Bettencourt.

[2] It is next urged the trial court erred in permitting plaintiffs to prove that an insurance company was interested in the case. Upon voir dire, seven of the prospective jury were asked whether they were interested financially in the Maryland Casualty Company, or in any other insurance company writing liability insurance. No objection appears to have been made by appellants to these questions. The questions were, however, proper, and it was not error for the respondent, in good faith, to ask such questions of the prospective jurors. 10 Cal.Jur.Supp. 661.

[3,4] Appellants strongly urge that the court erred in refusing to sustain objections to the following on cross-examination.

Mr. W. R. Sherman, a civil engineer, was called as a witness on behalf of defendants. This witness took measurements at the scene of the collision, and made a map of the highway for use at the trial. He was asked on cross-examination:

"Q. By the way, who ordered you to go out and make these measurements?
A. I was requested to go out by Mr. Haw-

kins. * * * Mr. Hawkins asked me to wait for a couple of men who would be over in a half hour's time from Modesto, to meet them and go out to the scene of the accident. * * *

"Q. Did they tell you their interest in the case? (Objection and argument by counsel.) A. I believe that one said he represented an insurance company, and the other was a photographer. * * *

"Q. They told you their interest was in behalf of the truck, didn't they? (Objection and argument.) A. I don't recall exactly what was said in that respect."

To these questions appellants interposed various objections, which were overruled, and they now argue that prejudicial error was committed in permitting the jury to be informed that Mr. Hawkins, one of the attorneys for the insurance company, had employed the engineer to meet with a representative of an insurance company, and go to the scene of the accident and take certain observations.

The questions asked, so appellants contend, do not refer to who gave the orders for the preparation of the maps and the taking of the measurements, and did not call for an answer which would show interest or bias of the witness, but the purport of the question was what a third party said concerning his interest in the case, and not the interest of the witness who made the map. Appellants also contend it was not proper cross-examination because conversation between the witness Sherman and the two men he was to meet had not been referred to on direct examination, and furthermore the answer called for hearsay evidence.

We believe, however, the questions were not objectionable and were within the reasonable limits of cross-examination. Respondents were within their rights in establishing the fact, if they could, that the engineer had, in co-operation with representatives of the truck company, located material points upon the map, discussed the case, and perhaps was looking to the company for his compensation. Furthermore, the question did not necessarily call for any reference to the insurance company. If they represented the owners or operators of the truck, plaintiffs had a right to bring out that relationship. Facts tending to show interest, bias, or motive on the part of a witness, may always be brought out on cross-examination even though it may

thereby be disclosed that the defendant was protected by insurance.

In *Coursault v. Schwebel*, 118 Cal.App. 259, 5 P.2d 77, a physician had made a physical examination of the plaintiff, and on cross-examination was asked as to who requested him to make such examination. The physician answered that he acted either at the request of the attorney for defendants or the insurance company, which, he did not recall. In *Levy v. Berner*, 110 Cal.App. 65, 293 P. 896, the doctor was there asked on cross-examination who had employed him, and he replied that he was requested to act by a person associated with a certain insurance company. These answers were held proper as they tended to impeach the credibility of the witness or to show interest in the case. Notes discussing this point will be found in 56 A.L.R. 1439, 74 A.L.R. 855, and in 95 A.L.R. 397.

While attorneys may not deliberately drag in the fact that defendants are protected by an insurance company, it is very generally known in these days, to every person of understanding, that most owners and operators of automobiles are now protected by some form of insurance, and particularly do they believe that common carriers operating large trucks upon the highways are so protected, so we do not believe that the questions and answers heretofore referred to could have made any difference in the final outcome of the case, or in the amount that the jury awarded.

[5] Appellants also claim the evidence is insufficient to support the judgments in these cases. Without quoting extensively from the record, we have no doubt that the testimony of the various witnesses, some six or seven, if believed by the jury, was sufficient to support the judgment. The testimony of the traffic officer and the statement of the driver of the truck himself, were sufficient to establish negligence per se.

[6,7] It is claimed by appellants the court erred in excluding proffered testimony of expert witnesses, offering to show that at the moment of impact the semi-trailer was to the east of the center of the highway. This they were attempting to do by computing the time it would take for the grain to fall from the broken sacks, the course of the trailer after damage to the axles, etc.; in other words, trying to

reconstruct by expert testimony what had happened.

Courts look with disfavor upon this type of testimony upon the ground that it is impossible to establish all of the necessary elements such as the reaction of the human mind under a certain set of circumstances; the impossibility of having complete knowledge of the exact speed, course of the wind, if any, and force of the impact. Furthermore, many of the physical and mathematical facts of which the experts were to testify were given in evidence before the jury in testimony by Mr. Warren and in the instructions of the court, making the deductions by the engineers unnecessary. Also, counsel in their argument were not restricted, and fully discussed there various elements, so no material injury could have been sustained by appellants.

[8] Objection is also made to a question asked by the court in regard to the effect upon one of the children of the loss of its mother. Respondents were attempting to show this effect upon the minor child, and the court asked a witness: "Q. Did you notice any change in the child, did you notice his behavior in relation to his mother?" To this question an objection was made that it was not the proper measure of damages. The court said: "The objection is overruled. The court feels it does affect the measure of damages, and if the child is grief stricken, which the court does not undertake to say whether he is or is not, but you may state what you observed in regard to the child before and after the death of the mother, if there is any difference, I don't know."

Appellants claim that is not a proper measure of damage, as a claim for the death of a person does not include damages for sorrow, grief, or mental suffering occasioned to the heirs by death. The answer called forth by this question did not go to the mental suffering or grief incurred by the death of the mother, but was, "Yes, there is a little difference, for he feels a little lonesome, you might say, and we can see ourselves sometimes for quite a while when we took them home from the hospital, they would wake up at night and call for their mother and we would get up, my wife would get up, you know, and go right up to them and talk to them and then pretty soon they would talk a little better, you know, and change their mind and then they would call for the Godfather."

This answer would tend to show that the children were not so much grief stricken as they missed the care and comfort of their mother during the night.

Furthermore, the court fully instructed the jury on the measure of damages and set forth fully and correctly all of the elements that could be considered by the jury. We must assume they were governed by those instructions, and no miscarriage of justice occurred by any remark of the court.

[9,10] It is claimed, furthermore, that the verdicts in each case were excessive. No motion for a new trial was made, which is the proper place to raise such point (*Williams v. A. R. G. Bus Co.*, 47 Cal.App. 568, 190 P. 1036), but nevertheless we have read the record and can find no indication of bias or prejudice on the part of the jury in arriving at their verdict. We have here a claim for the death of a wife and mother who left a husband 35 years old, and two sons 10 and 6 years old, the wife being 33 years of age, in good health, and doing all of the housework and helping with the work upon the ranch. She was active in church affairs and brought her children up in the faith of their church, taught them English, and contributed in many ways to their education and in building their character. Both the husband and the wife had an expectancy of over 30 years. We cannot say that the amount of the award here was unreasonable.

[11,12] In the case of Alexandrino Moniz, he incurred injuries such as infected wounds upon the head and face, a fracture of the arm, which has resulted in a permanent disability, an injury to the nerve of the lip, which deprives it of feeling, and an injury to the chest causing a pulmonary abscess. He was in the hospital some 79 days, and after that required plastic surgery on his face. It must be remembered also that out of the \$10,000 must be paid charges for medical and hospital costs of over \$2,600. So, too, without enumerating the various injuries sustained by Chester, aged 6, we find that his injuries were sufficiently detailed by a doctor to justify the award granted. Among other injuries he bears disfiguring facial scars, the nerve controlling an eyelid is injured, causing the lid to droop; injury to the frontal sinus, and it will require an expensive surgical operation to correct an injury of the nose.

Finding no serious error in the record and also that there was no bias or prejudice shown by the jurors in the verdict returned, it is the conclusion of this court that, as to the judgment against J. M. Bettencourt, it be reduced in the amount specified by section 402(b) of the Vehicle Code, but in other respects the judgments appealed from should be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.



KRAMER v. U. S. MACH. CO. *

Civ. 5919.

District Court of Appeal, Third District,
California.

Feb. 17, 1938.

Rehearing Granted March 17, 1938.

1. Mines and minerals ⇨17(1)

A location of mining claim is ineffective, unless there was actual discovery of gold, silver, or other precious metals mentioned in statutes within limits of claim. Civ.Code, § 1426; 30 U.S.C.A. § 23.

2. Mines and minerals ⇨38(17)

Evidence in action to quiet title to mining claims held not to show discovery of any precious metals mentioned in statutes within limits of such claims, as required to render location thereof by plaintiff's grantor effective. Civ.Code, § 1426; 30 U.S.C.A. § 23.

3. Mines and minerals ⇨38(2)

Plaintiff in action to quiet title to mining claims must prevail on strength of his own title, not weakness of title asserted by defendant.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Action by Charles W. Kramer against the U. S. Machinery Company to quiet title to certain mining claims. Judgment for plaintiff, and defendant appeals.

Reversed.

Charles L. Gilmore, of Sacramento, for appellant.

*For subsequent opinion see 85 P.2d 552.

Joseph H. Huberty, of San Andreas, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment quieting title to twenty-seven mining claims situate in Calaveras county. From this judgment the defendant appeals.

The record shows that at one time a man by the name of Frederick H. Rindge located forty-five lode mining claims in Calaveras county, and did considerable development work thereon. Annual labor or assessment work was last performed upon said mining claims in 1930.

The record shows that during the years 1931, up to 1935, Congress passed certain acts suspending the annual assessment work required by the statute of the United States. The act in question required the filing of certain notices. The record shows that no notice of a desire or intention to hold any of the claims referred to in the complaint was ever filed in the office of the county recorder by Frederick H. Rindge, or any one in his behalf. On February 13, 1935, Harda Kramer located twenty-seven of said mining claims, and thereafter, and on the 18th day of February, 1935, conveyed said twenty-seven mining claims to Charles W. Kramer, her husband, who is the plaintiff in this action. On February 25, 1932, Gladding, McBean & Co. recovered judgment against Frederick H. Rindge, and caused two of said mining claims, to-wit, Gold Cliff and Buckhorn, together with some other property, to be sold under a writ of execution, receiving a sheriff's deed therefor, June 20, 1935. On August 27, 1935, Gladding, McBean & Co. transferred said property to the U. S. Machinery Company, a corporation, the appellant in this action.

Upon this appeal the appellant presents two questions for consideration, constituting two causes alleged to be sufficient to necessitate a reversal of the judgment. The first question presented is whether the acts of Congress suspending the annual assessment work on mining claims, containing no penal provisions for failure to file the notices provided therein, work a forfeiture ipso facto of mining claims. The second, in an action to quiet title to unpatented mining locations, is it essential, to recovery by plaintiff, that he plead and establish by proof, and the findings of

fact by court show all the requirements necessary to a valid mining location, including discovery? If the second question propounded is answered in the affirmative, it is unnecessary to extend the length of this opinion by considering the question of whether a failure to file notice of intention, as specified in the acts of Congress, works a forfeiture.

[1] Section 2320 of the Revised Statutes of the United States, and section 23, being the same section of the law found in 30 U.S.C.A., so far as pertinent here, reads as follows: "Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits located prior to May 10, 1872, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location."

Section 1426 of the Civil Code reads: "Any person, a citizen of the United States, or who has declared his intention to become such, who discovers a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposit, may locate a claim upon such vein or lode," etc.

The gist of the various decisions is that there must be actual discovery of gold, silver, or other precious metals mentioned in the statutes, within the limits of the claim located; otherwise, the location is ineffective.

[2] On the part of the appellant it is contended that the testimony in this case fails entirely to show the discovery of any gold, silver, or other precious metals mentioned in the statutes, within the limits of the claims attempted to be located. That this contention is meritorious and must be upheld, appears from the record, from which we copy all of the testimony relating to that question.

The testimony of Mrs. Kramer, the locator, is as follows:

"Q. And did you discover any rock or mineral bearing rock or vein at that point? A. Yes; we discovered—seen rock.

"Q. Did you believe at that time that you would be justified in spending time and money for the purpose of developing a paying mine? A. I did.

"Q. Mrs. Kramer, what experience have you had in mining prior to the dates of the location of these several claims? A. I have had no mining experience.

"Q. Had you ever located a mining claim before that? A. No, sir."

The plaintiff's testimony is as follows: "There is a ledge on the Gold Cliff that runs out underneath the barn. There is also a ledge that runs across from the face of the tunnel and connects up across the creek which is in place. There is at that place a vein of gold-bearing rock or quartz. On the Buckhorn Claim there is a discovery hole which I supposed Mr. Rindge and them put back in the side of the bank, and on top of that above it there is a ledge comes down. There is a blanket formation, and then a ledge comes down on top of the hill. I wasn't at the Riverside or the Jumper or the Good Luck or the Rajah or the Providence Claims the day the locations were made. On the Deep Gulch Claim there is a quartz-lead runs across on top of the hill which there was a discovery point there and which shows quartz. The Croesus was up on top of the hill and there is a discovery point there, a big vein in place. We went up and looked it over and we thought it was well worth our time locating it. It had been located by Rindge before. There is a cross vein on the Comet Mine which runs in through the Colossus and crosses it. From the Sparrow Hawk they dug a hole for location which shows quartz. The Keystone was the same as all the rest of them. There was two or three different places dug on that property in one shallow hole, showing quartz and rock in place. On the Colossus there was a location right in the center of that claim there and it showed a nice vein there with rock in place, several blowouts. It was quartz-rock. On the North Star Mining Claim there was a quartz vein there and shoot of quartz. The Airship conflicts with a couple of other claims and we went over the claim back and forth over it and put our location in the center of it where the quartz vein goes across the lode line and the discovery was made. There was two holes on the Gold King and on the Golden Rule that had been sunk down there, and both showed a nice quartz ledge. The Airship, Gold King and Golden Rule apparently have a lode line extending from one to the other. I was able to trace it. I wasn't at the Mount Pleasant when the location was made, but have been since. It is a big round hole and a big ledge or lode line goes across it. The location notice is posted on top of the hill and there was a discovery at that point. On the

Overland there is the lode line goes over that trench dug there. The lode line goes over the Confidence and quartz shows also above the road. The Rattlesnake lays down below the right of the right-hand side going up, and there was a big quartz vein goes down through there and several blowouts. I was not at the Bullion the day it was located. The lode line of the Ohio runs across it. There is quartz in there, a couple of shafts, a tunnel which has been known for years as a mine, forty or fifty years ago. I was not at the Rajah, the Manzanita or the Bullfrog on the day they were located. At the Claude W. there is several ditches and trench work done, and also on the Ruth N. There has been rock or lode in place excavated. I have been to the point of discovery on the Riverside and there is a good vein, but it is broken up. On the Jumper there is rock in place there, but where they had been driving a little tunnel there is nothing at all. There lode lines on all which we took up. There is a bunch of claims south of the Gold King, Golden Rule and Airship such as the Bobcat and Texas. We could never find anything on them. The Ohio has got plenty of quartz on it. All those up there have. The Manzanita was a little hard to find, but we found some quartz on there that showed pretty fair. The same line goes through the Bullfrog."

A witness by the name of Wiley, a civil engineer, testified as follows:

"Q. Mr. Wiley, at the point where these location notices were posted on the 27 several and respective claims was there a vein or lode of quartz in place bearing gold or other mineral? A. I think in practically every case there was some sort of showing.

"Q. Do you recall now any in which there was not? A. Well, I would be giving my personal opinion on a matter of discovery if I would say to what extent there was a showing by assumption as a witness in pointing out these points so that the locator would be satisfied with the showing as on the ground, although in most cases there was. I would say in pretty nearly every case there was a showing of quartz or something that would justify a locator in locating a mining claim.

"Q. Mr. Wiley, what is the type of area covered by these locations? A. I would say in general, that the land would impress one as more applicable to mineral than any other thing you could think of as.

"Q. What is the topography? A. It is a rocky brushy country.

"Q. Rough and mountainous? A. Yes, it is hilly.

"Q. What is the type of brush growing thereon? A. Chaparral, generally call it chapparal.

"Q. Is it a mineral area? A. Yes, it is a mineral area.

"Q. And what type of minerals are contained in the area? A. For the most part the general character of the ground is granite and limestone.

"Q. Is there quartz also? A. Yes, there is quartz showing in stringers and they are called blowouts.

"Q. Did you observe that same condition throughout this entire area, where the location notices are posted? A. The whole area is very similar, yes."

As contended by the appellant there is not one word showing discovery of rock in place bearing minerals, as provided by the statutes of the United States, and by section 1426 of the Civil Code.

In *Garibaldi v. Grillo*, 17 Cal.App. 540, 120 P. 425, the court, in substance, stated: "There must be evidence with respect to quartz or lode claims that there is a vein or lode of mineral rock in place containing minerals of such character and quantity that a reasonably prudent man would be justified in expending time and money developing the same," etc.

In *Harper v. Hill*, 159 Cal. 250, 113 P. 162, 166, the court, considering a like question, used the following language: "The record does not set forth any substantial evidence of a discovery of valuable mineral within the lines of the claim. The defendants testified that there were seams of mineral upon the claim, but they did not state of what such mineral consisted. The term is too vague and general to justify this court in reversing a finding upon the theory that the witnesses intended to declare that the mineral in question was valuable and of a character that would support a mining location under the laws of the United States. A discovery of valuable mineral within the located boundaries is an essential prerequisite to a valid mineral location upon public lands of the United States."

The case of *Stinchfield v. Gillis*, 96 Cal. 33, 30 P. 839, has no bearing upon the questions involved in this action. That action was one to recover the value of gold

alleged to have been taken from a claim belonging to the plaintiff. The court in that case, however, does quote from *Jupiter Mining Co. v. Bodie Consol. Co.*, C. C., 11 F. 666, 675, to the effect that a vein or lode consists of quartz in place carrying gold, silver, or other valuable mineral deposits named in the statute. To the same effect is the case of *Nevada Sierra Oil Co. v. Home Oil Co.*, C. C., 98 F. 673.

In *Tuolumne Consolidated Mining Co. v. Maier*, 134 Cal. 583, 66 P. 863, among other things the court said: "We take it to be the conceded law that there can be no valid location of a mining claim without an actual mineral discovery thereon."

[3] We do not deem it necessary to cite authorities to the effect that the plaintiff must prevail upon the strength of his own title, and not upon the weakness of the title asserted by his adversary. In this case the testimony which we have quoted and the authorities which we have cited we think establishes beyond question that the plaintiff has established no title to the premises claimed by him.

The judgment is reversed.

We concur: PULLEN, P. J.; THOMPSON, J.



25 Cal.App.2d 81

PEOPLE v. ROSENBERG et al.

Cr. 1606.

District Court of Appeal, Third District,
California.

Feb. 15, 1938.

Rehearing Denied March 2, 1938.

1. Licenses  42(3)

An information, based on violation of Corporate Securities Act, which alleged that accused received stock from another person for purpose of selling at market, the proceeds to be used to buy other stock, but which failed to allege any act within the inhibitions of the act, was defective for failure to charge a public offense. St.1935, p. 829.

2. Licenses  42(4)

Evidence that accused received stock, took it to bank, which sold part of stock to a licensed broker, held not to support convic-

tion for a violation of the Corporate Securities Act. St.1935, p. 829.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

J. A. Rosenberg was convicted of violation of the Corporate Securities Act, and he appeals.

Reversed.

Bertram H. Ross and William E. Ferriter, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Gordon H. Hughes, Deputy Atty. Gen., for the People.

PER CURIAM.

The action as to Joseph Murphy appears to have been dismissed. The appellant J. A. Rosenberg was convicted upon an information filed by the district attorney of El Dorado county purporting to charge the appellant with violating certain provisions of the Corporate Securities Act. The information is in two counts. The charging part of count No. 1 is in the following words and figures: "The said J. A. Rosenberg and Joseph J. Murphy on or about the 26th day of March, A. D., 1937, in the said County of El Dorado, in the State of California, and before the finding of this indictment, did then and there unlawfully, feloniously and knowingly engage, either wholly or in part, in the business of selling, offering for sale, negotiating for the sale of, or otherwise dealing in securities issued by others and falling within the definition of the term 'securities' as stated in said Act, without having first applied for and secured from the Commissioner of Corporations a certificate, then in effect, authorizing the said J. A. Rosenberg or the said Joseph J. Murphy so to do, to-wit: Did then and there receive from one Leo E. Flynn 782 shares of Transamerica Corporation stock, owned by said Leo E. Flynn for the purpose of selling at market, the proceeds thereof to be used for the purchase of Landowners Producing Oil Royalty for the account of said Leo E. Flynn, all contrary to and in violation of section six of the Corporate Securities Act (Chap. 532, Stats.1917, as amended; Act 3814, Deering's General Laws of Cal. 1931, as amended [St.1933, p. 2315])"

Count No. 2 is in identical language, save and except that the stock referred to was received by the appellant from one Kathleen C. Flynn.

The appellant urges two grounds for reversal:

First, that the information charges no public offense;

Second, that the testimony introduced at the trial failed to show the commission of any public offense.

Omitting all that part of the information which is merely language expressing the conclusion of the pleader, the information charging the offense is as follows: "The said J. A. Rosenberg or the said Joseph J. Murphy did then and there receive from one Leo E. Flynn 782 shares of Transamerica Corporation stock owned by said Leo E. Flynn, for the purpose of selling at market, the proceeds thereof to be used for the purchase of Landowners Producing Oil Royalty."

The attempted statement of facts constituting the offense in the second count is in identical language, save as to the name of Kathleen C. Flynn. It will be observed that the statement of the facts alleged to have constituted the commission of the offense fails to charge the appellant with selling, or attempting to sell any stock whatsoever, nor does it state any facts stating that the appellant was engaged in the business of stock selling. There is no statement in the information of any facts showing that the appellant ever solicited anyone to purchase the stock in question, or issued any circular, memorandum, notice, or otherwise soliciting purchasers for said stock. There is not one word in the information stating any facts showing that the appellant offered stock for sale, or negotiated for the sale of stock in question. It appears from the information that the stock in question was not issued by others, or of the performance of any act or language bringing the action of the appellant within any of the definitions or inhibitions of the statute contained in subdivision 10 of section 2 of the Corporate Securities Act, as amended by St.1935, p. 829, relating to the meaning of the word "broker." Subdivision 10 of section 2, supra, reads as follows: "The word 'broker' includes every person or company, other than an agent, who shall, in this State, engage either wholly or in part in the business of selling, offering for sale, negotiating for the sale of, or otherwise dealing in any security issued by others, * * * or of underwriting any issue of such securities, or of purchasing such securities with the purpose of reselling them, or of offering them for sale to the public."

Nor is there any statement in the information which brings the act of the appellant

within the terms and provisions of subdivision 8 of section 2 of the Corporate Securities Act, as amended by St.1935, p. 829, relating to the definition of the words "sell" or "sale." There is no charge in the information that the appellant was attempting, or did attempt to dispose of any stock for value. No bonus was mentioned; no contract of sale is shown; no option of sale is charged to have been given, no solicitation of sale; and no other act charged as coming within the inhibitions and definitions contained in said subdivision.

The facts of the case are likewise deficient in showing the commission of any public offense. In substance the testimony shows that the appellant received the stock in question, took it to San Francisco, put it in charge of the Anglo-California Bank, and the Anglo-California Bank, through a regularly licensed broker, succeeded in selling a portion of the stock. So far as the alleged offense is concerned, the testimony shows nothing more.

[1,2] It is apparent from the foregoing that the information failed to charge, and the testimony likewise failed to show the commission of any public offense.

At the conclusion of the trial the appellant made a motion for a new trial, which was denied. From the order and judgment the defendant J. A. Rosenberg has appealed.

The order and judgment are reversed.



25 Cal.App.2d 37

**BANK OF AMERICA NAT. TRUST &
SAVINGS ASS'N v. GOLDSTEIN
et al.**
Civ. 5917.

District Court of Appeal, Third District,
California.

Feb. 10, 1938.

Hearing Denied by Supreme Court
April 11, 1938.

1. Evidence ⇨432

Oral evidence is competent to show lack of consideration for note as between original parties thereto. Civ.Code, § 3109.

2. Bills and notes ⇨96

A note, secured by trust deed, for unpaid portion of purchase price of land con-

veyed, was supported by adequate consideration to bind maker, though executed as mere accommodation to another; consideration passing directly to accommodation maker being unnecessary. Civ.Code, § 3110.

3. Bills and notes ⇨518(1)

Testimony that witness took title to mortgaged property to secure unpaid portion of purchase price thereof and partly as security for debt to him from real owner furnished evidence of good consideration passing directly to witness as maker of note secured by mortgage. Civ.Code, § 1605.

4. Evidence ⇨418

Evidence of bank president's oral agreement when note for purchase price of land and trust deed securing it were executed that maker would not be held liable on note was inadmissible in suit to foreclose trust deed as tending to vary terms of written instrument.

5. Evidence ⇨402

The maker of a note is estopped to contradict plain language thereof.

6. Pleading ⇨238(2)

Defendant had no right to amend his answer on morning of trial without previous notice of application for leave to do so; arbitrary statutory right to amend answer without court's consent being limited to ten days allowed plaintiff after service of answer to demur thereto. Code Civ.Proc. § 443; §§ 472, 473, as amended by St.1933, pp. 1850, 1851.

7. Pleading ⇨229

Courts should be liberal in allowing amendments to pleadings in furtherance of justice when they may be authorized without prejudice to substantial rights of others than pleader. Code Civ.Proc. § 473, as amended by St.1933, p. 1851.

8. Pleading ⇨258(3)

The trial court did not abuse its discretion in denying motion, made by defendant in mortgage foreclosure suit on morning of trial over five months after filing answer and over year after complaint was filed, to amend answer so as to charge fraud by bank president in inducing defendant to take title to mortgaged land as trustee for another and execute note and trust deed to secure unpaid portion of purchase price by oral assurance that he would not incur personal liability thereby. Code Civ.Proc. § 473, as amended by St.1933, p. 1851.

9. Pleading Ⓒ229

Amendments to pleadings should be freely granted in interest of justice, so as to hear and determine cause on every legitimate issue which may fairly be presented. Code Civ.Proc. § 473, as amended by St. 1933, p. 1851.

10. Pleading Ⓒ236(1)

Applications to amend pleadings are addressed to court's sound discretion. Code Civ.Proc. § 473, as amended by St. 1933, p. 1851.

11. Appeal and error Ⓒ959(1)

The appellate court cannot interfere with exercise of trial court's discretion on application to amend pleadings, unless clearly abused. Code Civ.Proc. § 473, as amended by St. 1933, p. 1851.

12. Contracts Ⓒ346(2)

A defense of fraud must be pleaded and proved.

13. Banks and banking Ⓒ109(2)

A bank president has no legal right to relieve maker of valid note, held by bank in due course, from liability to pay it, in absence of authority from bank to do so.

Appeal from Superior Court, Butte County; Albert F. Ross, Judge.

Suit by the Bank of America National Trust & Savings Association against J. Oscar Goldstein and others to foreclose a trust deed securing payment of a note. From a judgment for plaintiff against named defendant, the latter appeals.

Affirmed.

Grayson Price and J. Oscar Goldstein, both of Chico, for appellant.

Rich, Weis & Carlin and W. P. Rich, all of Marysville (Richard H. Fuidge, G. D. Schilling, Louis Ferrari, and I. A. Cereghino, all of San Francisco, of counsel), for respondent.

PER CURIAM.

The defendant J. Oscar Goldstein has appealed from a judgment which was rendered against him in a suit to foreclose a trust deed executed to secure the payment of a promissory note of even date therewith for the sum of \$3,682.54 and interest.

The appellant contends he is not liable for payment of this note because he was not the owner of the property, but held title

thereto merely as trustee for his client who was the real owner of the land; that the note and trust deed were given without consideration as a mere accommodation to the bank and to the owner of the lot, together with an accompanying oral agreement on the part of the payee of the note that the appellant would be held free from personal liability thereon; that the court erred in rejecting evidence of the alleged oral agreement relieving the appellant from personal liability on the note and abused its discretion in refusing to permit the appellant to amend his answer on the morning of the trial so as to allege fraud on the part of the bank in procuring the execution of the note and trust deed.

May 15, 1928, for an expressed "valuable consideration," Butte County Savings Bank, a corporation, conveyed to J. Oscar Goldstein lot 5 of Evans tract of the Rancho Arroyo Chico, in section 16, township 22 north, range 1 east, in Butte county, Cal., according to the official map of that tract, No. 67, on file in the office of the county recorder of Butte county. On the last-mentioned date, "for value received," the appellant executed and delivered to the bank his promissory note, due May 15, 1931, for the sum of \$3,682.54, payable in semiannual installments of \$100, together with interest at the rate of 7 per cent. per annum, which note was secured by a trust deed to the land above described. The note, in unambiguous language, free from conditions or qualifications, creates a clear obligation and promise on the part of appellant to pay the debt according to the terms of the instruments. The trust deed is drawn in the usual form. It refers to the note which recognizes the debt as the obligation of the appellant, and conveys the land as the property of the grantor to secure the payment of the note. It is not claimed either of these instruments contains any language which is obscure or uncertain. Neither instrument suggests that the appellant was not then the real owner of the land, or that he was to be held exempt from personal liability for payment of the entire note.

August 14, 1931, "for value received," the Butte County Savings Bank sold and transferred this note and trust deed to the respondent. It is conceded the respondent is the owner and holder in due course of the note and trust deed. The amount of unpaid balance on the note is not disputed. No part of the principal, and only the sum of \$1,012 of the accrued interest was paid. The note was about to become outlawed.

May 15, 1935, the plaintiff, therefore, brought this suit to foreclose the trust deed. After demurrers to the complaint were overruled, separate answers of the respective defendants were filed on December 13, 1935. The answers deny the material allegations of the complaint. The appellant's answer affirmatively alleges that the note and trust deed were executed without consideration as a mere accommodation to his codefendant, W. V. Helphinstine, and to the Butte County Savings Bank; that the appellant was not the owner of the mortgaged land, but held title thereto merely as trustee of his said client who purchased the lot from the bank for \$4,882.54, and that the appellant, at the request of the bank and Helphinstine accepted a deed to the land and executed the note and trust deed to secure the unpaid balance of the purchase price thereof, for the reason that the real purchaser of the lot was then in serious financial trouble. It was also alleged that as a part of the same transaction the bank assured the appellant he would be relieved of personal liability for the payment of the debt or the fulfillment of the obligations of the note and trust deed.

On the morning of the trial, July 1, 1936, the appellant, for the first time, asked permission of the court to file an amendment to his answer charging Guy R. Kennedy, as former president of the bank, who, at the time of the trial, was dead, with fraud in thus procuring the appellant to accept a deed to the land and execute his personal note and trust deed thereon to secure the unpaid portion of the purchase price of the lot, with the accompanying oral promise that he would be relieved from personal liability on that account. Notice of the hearing of this motion to amend the answer was not previously served on the plaintiff as required by section 473 of the Code of Civil Procedure, as amended by St.1933, p. 1851. The plaintiff had no previous knowledge that the application would be made. The court denied the motion to amend the answer on the ground of lack of notice thereof, and because the proposed amendment tendered a new issue which the plaintiff was unprepared to meet at the trial. A motion to continue the time of trial was also denied. The cause was tried by the court sitting without a jury. Findings were adopted favorable to the plaintiff upon every essential issue in the case. Judgment for the principal amount of the note and accrued interest in the aggregate sum of \$4,949 was rendered against the appellant, together

with a decree of foreclosure of the trust deed, to satisfy the judgment. After sale of the property, \$2,422.61 of the indebtedness remained unsatisfied. A deficiency judgment for that sum was entered against the appellant. This appeal was then perfected.

[1,2] The judgment and findings are supported by the record. Oral evidence is competent to show a lack of consideration as between the original parties to a note. Section 3109, Civ.Code; *Braserton v. Vokal*, 53 Cal.App. 582, 200 P. 670; 19 Cal.Jur. 1027, § 169. But, assuming that the appellant executed the note and trust deed as a mere accommodation to his client, Helphinstine, to secure the unpaid portion of the purchase price of the land, it nevertheless furnishes adequate consideration for the note to bind the maker thereof. There is no evidence the note was executed as a mere accommodation to the bank. It is not necessary that the consideration should pass directly to the accommodation maker of the instrument. *Chambers v. Washam*, 113 Cal. App. 749, 299 P. 91; section 3110, Civ.Code; 95 A.L.R. 972, note; 3 R.C.L. 927, § 123. In the authority last cited it is said:

"The contract evidenced by a bill of exchange or promissory note imports a consideration * * * because of the negotiable quality of the instrument. Every person who appends his name to the paper is a party to it, and from its negotiable character each is an original undertaker. * * * Each name constitutes a direct original promise founded upon the same consideration. No consideration moving to one who becomes a party merely for accommodation is necessary to support his contract. To fasten liability upon an accommodation endorser it is not necessary that any consideration should move directly to him. The contract of such endorsement is supported by the consideration moving to the payee from the person to whom he negotiates the instrument. Nor is any consideration moving to the accommodation maker necessary to uphold an accommodation note; the consideration which supports the promise of the accommodation maker is that parted with by the person taking the note and received by the person accommodated."

Section 3110 of the Civil Code is conclusive of the liability of an accommodation maker of a note under the circumstances of this case. That section reads:

"An accommodation party is one who has signed the instrument as maker, drawer, ac-

ceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

[3] Moreover, the appellant testified that he took title to the property which was mortgaged to secure the unpaid portion of the purchase price thereof, and partly as security for a debt of \$3,200 due to him from his client, Helphinstine. That furnishes evidence of good consideration, as defined by section 1605 of the Civil Code, passing directly to the maker of the note. The appellant said: "Didn't you take the deed as part security for that [\$3,200 debt, which Mr. Helphinstine owed to you]? * * A. Unquestionably if there had been any equity in the property, if a man owed me money and it looked like there was anything at all, naturally I would have expected payment." He also wrote a letter to the plaintiff dated May 14, 1934, in which he stated that he held title to the property partly to secure the \$3,200 indebtedness. It reads in part:

"I have been holding the legal title to the property solely in the nature of trustee for Mr. W. V. Helphinstine, and also as security for an indebtedness due and owing from him to me in the sum of approximately \$3,200.-00."

The finding that the note was supported by adequate consideration is sustained by the evidence.

[4, 5] The court properly sustained plaintiff's objections to the evidence which was offered for the purpose of proving an alleged oral agreement on the part of the president of the Butte County Savings Bank, at the time of the execution and delivery of the note and trust deed in question, to the effect that the appellant would be held harmless and that no personal liability would attach to him as a result of that transaction. That evidence was received subject to objections by the plaintiff on the ground that it was incompetent for the reason that it tended to vary the terms of the written instruments. The court finally sustained those objections and struck the evidence from the record. It is contended those rulings constitute reversible error. We think not. The rejected evidence of which the appellant primarily complains consists of an alleged oral statement made at the time of

the transaction in question, by Guy R. Kennedy, who was then president of the bank, but who subsequently died, to the effect that Mr. Goldstein, who executed the note and trust deed, would not be held liable for the obligation represented thereby. That evidence of an accompanying oral agreement tended to vary the terms of the written instruments. Both the promissory note and the trust deed declare in unambiguous language that Mr. Goldstein promised to pay to the bank the full amount of the obligation and that he is therefore personally liable therefor. That proffered evidence is incompetent. The appellant is estopped from contradicting the plain language of his note. *Van Haaren v. Whitmore*, 2 Cal.App.2d 632, 38 P.2d 829, 830; *Lompoc Valley Bank v. Stephenson*, 156 Cal. 350, 104 P. 449; *Koerberle v. Hotchkiss*, 4 Cal.App.2d 252, 40 P.2d 911; 4 Jones Comm. on Evidence, 2d Ed. 3002, § 1639; 95 A.L.R. 983, note; 54 A.L.R. 717, note. In accordance with the rule excluding testimony of an oral agreement accompanying the execution of a promissory note which is unambiguous in its language with respect to the liability of the maker thereof, it is said in the headnote found in 95 A.L.R. at page 983:

"The authorities are in substantial accord that an accommodation party cannot escape liability on his signature by showing that it was understood at the time of his signing the instrument that he would never actually be called on to pay it."

In the case of *Van Haaren v. Whitmore*, supra, which was an appeal from the judgment foreclosing a trust deed, under circumstances very similar to the facts of this case, the defendants contend as does the appellant in the present case, that they did not own the mortgaged property but took the title thereto in trust for the Fruitvale Spiritual Church and that they signed the note without consideration. Oral evidence in support of those facts was admitted over objections and subsequently stricken from the record as tending to vary the terms of the written instrument. It was contended on appeal that the exclusion of that evidence constituted error. The court said:

"The rule is well established that extrinsic evidence is not admissible to avoid the liability of the maker of a promissory note who signs in his individual capacity, even though he was acting in a representative capacity for another at the time, when the note is not uncertain, doubtful or ambiguous."

In the last-cited case, it is further said:

"Where, as here, it is contended that the note is not that of the defendants, but of another, it must appear from the instrument itself that the true object and intent of it are to bind the principal and not the person who signed the note, before he can escape personal liability. *Hobson v. Hassett*, 76 Cal. 203, 18 P. 320, 9 Am.St.Rep. 193. When the parties have deliberately put their agreement in writing, in such language as imports a legal consideration, it is conclusively presumed that the whole engagement and the extent and manner of their undertaking is there expressed. *Lindemann v. Coryell*, 59 Cal.App. 788, 212 P. 47. Since the defendants signed the note and wholly failed to indicate therein if they had a principal, or who or what the principal was, they have made themselves personally responsible for its payment.

"The contention that the defendants received no consideration for the note cannot be maintained. The plaintiff parted with the title to her property to them, and the detriment suffered by her in that behalf is sufficient, even though the defendants passed the title on to another without profit."

[6, 7] The appellant did not have a right under section 472 of the Code of Civil Procedure, as amended by St.1933, p. 1850, "as of course," or at all, to amend his answer on the morning of the trial of the cause without previous notice of his application therefor. The arbitrary right to amend an answer under that section, without the consent of court, is limited to the time during which the plaintiff was entitled to demur thereto as provided by section 443 of the Code of Civil Procedure, which is within ten days after the service of the answer upon the plaintiff. *Manha v. Union Fertilizer Co.*, 151 Cal. 581, 91 P. 393, 394; 21 Cal. Jur. 175, § 121. In the *Manha* Case, *supra*, it is said in that regard:

"An amended answer 'as of course' cannot be filed after a demurrer to the original answer has been disposed of, or after the time within which the plaintiff might have demurred, but did not, has expired. It can thereafter only be allowed upon stipulation or by leave of the court."

Concurring in that opinion Chief Justice Beatty said:

"I concur. As to the right of defendant to file an amended answer at any time before demurrer filed, it is sufficient for the purposes of this case to say that after an answer has been filed, and the issues so

formed have been set for trial on a day certain, with the knowledge and acquiescence of the defendant, he cannot, on the eve of the trial, file an amended answer, raising new issues, without leave of the court."

It follows that the appellant, under the circumstances of this case, was entitled to file his proposed amendment to the answer only by leave of court first secured pursuant to section 473 of the Code of Civil Procedure. It is true that courts should be liberal in allowing amendments to pleadings in furtherance of justice when they may be authorized without prejudice to the substantial rights of others.

[8] We are of the opinion the court did not abuse its discretion under the circumstances of this case in denying the appellant's motion to amend his answer to charge the Butte County Savings Bank with fraud in procuring him to take title to the land in question and to make and execute his note and trust deed thereon to secure the unpaid portion of the purchase price thereof.

The complaint was filed May 15, 1935. Upon application of the defendants their time to demur or answer was extended to October 15, 1935. Within that time their demurrer was filed. The demurrer was overruled and defendant's time to answer was extended. December 13, 1935, the appellant's answer was filed. The cause was set for trial for July 1, 1936. Without previous notice, on the morning of the trial, for the first time the appellant asked leave to file an amendment to his answer setting up the alleged defense of fraud on the part of the bank. The gist of that defense of fraud consists of allegations to the effect that the president of the bank, for its benefit, induced the appellant to take title to the land as trustee for his client, W. V. Helphinstine, because the client was financially embarrassed by the existence of several judgments against him, and that the appellant was persuaded to make and execute the promissory note and trust deed to secure the unpaid portion of the purchase price of the land, with the assurance on the part of the bank that the appellant would not incur personal liability thereby. This assurance constituting the alleged fraud was charged to Guy R. Kennedy, the president of the bank. It is not alleged he had authority from the bank to waive personal liability of the maker of the note. Mr. Goldstein stated to the court in that regard:

"This creates a distinct issue upon the question of fraud, and very unfortunately I am obliged to bring into this matter, Mr. Guy R. Kennedy, now deceased, who was president of the bank and of course attended to this transaction."

The appellant had five and a half months after filing his answer and more than a year after the complaint was filed within which to determine that he desired to defend against the foreclosure proceeding on the ground of fraud. At the time of the motion to amend the answer the plaintiff was present in court ready to proceed with the trial. No notice of the motion to amend the answer was previously served on the adverse party as provided by section 473 of the Code of Civil Procedure. It is reasonable to assume the plaintiff was not prepared to meet the new issue of alleged fraud. It had no warning to that effect. The court, in the exercise of its discretion, denied the motion to amend the answer on the ground that no notice had been previously served; that the appellant had not exercised due diligence in asking leave to amend his pleading; that the granting of the motion would be unjust to the plaintiff requiring it to meet the new issues without previous warning or preparation. On the ground of expediting the trial of the cause, and because of the appellant's lack of diligence in presenting his motion, a continuance of the time of trial was also denied.

[9-12] Such amendments should be freely granted in the interest of justice so as to hear and determine a cause upon every legitimate issue which may fairly be presented. 21 Cal.Jur. 183, §§ 127, 128. But applications to amend pleadings under the provisions of section 473 of the Code of Civil Procedure are addressed to the sound discretion of the court. With that discretion of the court we may not interfere, unless it clearly appears that it has been abused. *Williams v. Youtz*, 178 Cal. 107, 172 P. 383; *Portuguese American Bank v. Schultz*, 49 Cal.App. 508, 193 P. 806; 21 Cal.Jur. 181, § 126. In determining whether the court abused its discretion in denying the appellant's motion to amend his answer, all of the facts with relation thereto should be considered. The cause was pending since May 15, 1935. Several delays were granted by the court at the request of the appellant before the issues of the case were settled. His answer was filed five and a half months before the time set for the trial. During the entire time from the filing of the complaint, more than

a year previously, the appellant, who is an attorney of ability, must have known he could escape from the liability created by the clear language of the note and trust deed upon which the action is founded only by pleading his alleged defense of fraud. No principle of law is better known to the profession than that which requires a defense of fraud to be pleaded and proved. The appellant must have been aware of the facts constituting his alleged defense of fraud because the promise of the president of the bank upon which he relies was asserted to have been made to him personally at the time of the consummation of the transaction. Certainly it was a lack of diligence, under such circumstances, to fail to ask leave of the court to amend the answer to set up so vital a known defense until the morning of the trial.

[13] Moreover, without so deciding, it is doubtful whether the gist of the defense of alleged fraud which is set out in the proposed amendment would, if true, relieve the appellant from personal liability. It is clear from appellant's statement to the court that he relies on an asserted oral promise made to him by the president of the bank that he would not be called upon to pay the note and that no personal liability on account of his execution of the note and mortgage would attach. It is not alleged the president had any authority from the bank to relieve the maker of that or any other note from personal liability. In the absence of such authority, a president of a bank has no legal right to relieve the maker of an otherwise valid note held by it in due course from liability to pay the obligation. Such conduct would be a fraud upon the bank and upon its stockholders. It would upset the entire system of banking. In 4 *Zollman on Banks and Banking*, pages 259 and 260, §§ 2233 and 2234, it is said:

"The release or composition of a debt is a matter peculiarly within the province of the directors. It affects, not only the prosperity of the institution, but its very existence. * * * No paper held by the bank can therefore be nullified or released without consideration and without the consent of the board of directors. * * *

"Bank officers are engaged to manage the property of the bank, not to give it away, no matter how praiseworthy the object of the gift may be."

We are constrained to hold that it does not appear the court under the circumstances of this case abused its discretion in de-

nying appellant's motion to amend his answer.

The judgment is affirmed.



25 Cal.App.2d 109

KELLOGG v. HONCUT GOLD MINES CO.
Limited.

Civ. 5900.

District Court of Appeal, Third District.
California.

Feb. 17, 1938.

1. Appeal and error ⚡936(1)

The appellate court must assume on appeal from portion of judgment for plaintiff allowing him his costs, including fees of keeper of defendant's subsequently attached personalty that oral evidence, heard on defendant's motion to retax costs, showed that keeper's receipt, stating that he agreed to accept sum allowed by court for his services and released sheriff from personal liability therefor, meant that keeper agreed to release sheriff from liability beyond such sum, where bill of exceptions states that receipt was not offered or received in evidence, filed in appellate court or considered by trial court in determining motion. Code Civ.Proc. § 537, as amended by St.1933, p. 582; Pol.Code, § 4300b, as amended by St. 1935, p. 454.

2. Appeal and error ⚡709

The appellate court cannot disturb trial court's order, allowing plaintiff stated sum for fees of keeper of defendant's personalty, attached to secure payment of judgment for plaintiff, where bill of exceptions contains no evidence, heard on defendant's motion to retax costs, to warrant finding that order was erroneous. Code Civ.Proc. § 537, as amended by St.1933, p. 582; Pol. Code, § 4300b, as amended by St.1935, p. 454.

3. Appeal and error ⚡597(2)

A transcript, not containing judgment appealed from, is defective.

4. Appeal and error ⚡875

An appeal from judgment allowing plaintiff his costs by defendant challenging

trial court's subsequent special order retaxing costs is ineffectual as not reaching latter order, from which appeal should have been taken. Code Civ.Proc. § 963, as amended by St.1933, p. 2472.

Appeal from Superior Court, Butte County; R. M. Rankin, Judge.

Suit by Harvey H. Kellogg against the Honcut Gold Mines Company, Limited, a corporation. From a portion of a judgment for plaintiff allowing him his costs, including fees of a keeper of defendant's personal property attached to secure payment of the judgment, defendant appeals.

Affirmed.

J. J. Doyle, of San Francisco, for appellant.

H. D. Gregory, of Oroville, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant has appealed from that portion of a judgment which was rendered against it allowing to the plaintiff his costs including an item of \$324 as keeper's fees. The appeal is presented on a bill of exceptions.

Suit was commenced against the defendant. Under the provisions of section 537 of the Code of Civil Procedure, as amended by St.1933, p. 582, the personal property of the defendant was attached to secure payment of the judgment. Upon proceedings duly had, the sheriff placed a keeper in charge of the property pending the outcome of the litigation. The sheriff failed to demand of the plaintiff the deposit of money to pay the expenses of taking and keeping the property as provided by section 542, subd. 5, of the Code of Civil Procedure, as amended by St.1935, p. 1951, § 6. The keeper actually retained charge of the property for the period of 155 days. Judgment was rendered in favor of the plaintiff, including therein his costs of suit. In due time a memorandum of costs was filed, which contained an item of \$465 for keeper's fees. The defendant formally moved to retax the costs, claiming that the keeper had previously waived in writing his claim for fees for taking charge of the property. After the hearing of the motion to retax costs, at which oral evidence was

adduced, the court made an order January 15, 1937, allowing the sheriff for keeper's fees the sum of \$324. This was an order of court made "after final judgment" was entered.

[1,2] Upon the hearing of the motion to retax costs both the sheriff and the keeper were sworn and examined. The evidence of neither of these witnesses which was adduced at that hearing appears in the bill of exceptions. This court has no means of ascertaining what their evidence consisted of. The bill of exceptions does contain a purported "Keeper's Receipt," signed by the keeper, Robert A. Kellogg, which contains the following language:

"The undersigned agrees to accept and receive in full satisfaction for his services such sums as the Court in which said action is pending may allow, and hereby releases the said Sheriff of Butte County from any and all personal liability for the value of such services, or the amount fixed by such court. * * * To act as keeper without fees for service."

The foregoing receipt was not offered or received in evidence at the hearing of the motion. The bill of exceptions reads in that regard:

"Said document was commented upon and mentioned by counsel but was not offered nor received in evidence, nor filed herein, and the court did not consider the said document in determining the said motion."

There is therefore no evidence of the waiver of keeper's fees. Moreover, the receipt above quoted is ambiguous in its terms. For the purpose of this appeal, we must assume the oral evidence adduced at the hearing fully explains that receipt to reasonably mean that the keeper agreed to release the sheriff from personal liability for his fees beyond such sum as the court

should allow for that purpose. Since the bill of exceptions contains no evidence adduced at the hearing of the motion to retax costs from which we may find that the order allowing keeper's fees in the sum of \$324 was erroneously made, we are powerless to disturb that order.

Section 4300b of the Political Code, as amended by St.1935, P. 454, authorizes the court to allow the sheriff "for keeping and caring for property under attachment or execution, such sum as the court may fix; provided, that no greater sum than five dollars per day shall be allowed to a keeper when necessarily employed."

[3] In view of what has been previously said, upholding the validity of the order retaxing costs, it becomes unnecessary to so decide, but it appears that the transcript on appeal is defective, for the reason that it does not contain the judgment from which this appeal was taken.

[4] Moreover, the appeal from the judgment allowing costs, which was taken in this case, is ineffectual because it does not reach the challenged order retaxing costs which is a "special order made after final judgment" from which the appeal should have been taken as provided by section 963 of the Code of Civil Procedure, as amended by St.1933, p. 2472. *Monson v. Fischer*, 219 Cal. 290, 26 P.2d 6; *Hennessy v. Superior Court*, 194 Cal. 368, 372, 228 P. 862, 864; 7 Cal.Jur. 298, § 38. In the *Hennessy Case*, supra, it is said:

"It is now settled that an order on a motion to re-tax a cost bill made after the rendition and entry of final judgment is appealable as a special order after final judgment."

The judgment and the order are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

25 Cal.App.2d 104

CALIFORNIA REFINING CO. v. PRODUCERS REFINING CORPORATION.

Civ. 5934.

District Court of Appeal, Third District,
California.

Feb. 17, 1938.

1. Contracts ⇐10(2)

A contract in which the first party reserved the right to refine oil for other producers and agreed to refine for the second party not less nor more than a designated quantity of oil per day, but in which second party did not agree to deliver any quantity of oil, was unenforceable because of lack of consideration and lack of mutuality.

2. Contracts ⇐10(2)

A contract in the preamble of which the second party stated the desire to have certain oil produced by it refined by first party would not be construed as an agreement to furnish oil to be refined in absence of other provision so requiring. Civ.Code, § 1641; Code Civ.Proc. § 1858.

3. Contracts ⇐10(2)

A contract in which the first party agreed to refine not less nor more than a designated quantity of oil per day but in which the second party did not agree to deliver any quantity of oil would be construed as a whole but would not be construed as intending a reciprocal agreement on part of the second party, notwithstanding statement in preamble that second party "desired" to have certain oil produced by second party refined by first party, since such construction would require the "insertion of an omitted promise" contrary to statute. Civ.Code, § 1641; Code Civ.Proc. § 1858.

4. Contracts ⇐10(4)

A contract which reserves in either party an option to deliver or to accept personal property or which contracts for future delivery of personal property in a quantity which is dependent on the will of the other party is void for lack of consideration and mutuality.

5. Contracts ⇐168

The courts will not rewrite contracts by implying provisions unless necessary to carry out parties' intention.

6. Contracts ⇐10(2)

A contract in which the first party agreed to refine not less nor more than a designated quantity of oil per day did not impliedly obligate second party to deliver any quantity of oil for refining.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Suit by the California Refining Company against the Producers Refining Corporation for declaratory relief under section 1060 of the Code of Civil Procedure, involving a contract to refine oil. From an adverse judgment, the plaintiff appeals.

Affirmed.

Raymond J. Kirkpatrick, of Long Beach, for appellant.

Kiggins & Hoffman, of Los Angeles, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from an adverse judgment which was rendered against it in a suit for declaratory relief under section 1060 of the Code of Civil Procedure construing a contract to refine oil.

In April, 1935, the respective parties to this suit signed a written agreement, in which the plaintiff appears as party of the first part, and the defendant as party of the second part. The instrument recites that the first party owns an oil refinery at Seal Beach, Cal. The preamble then asserts that:

"Whereas, the party of the second part has certain production from wells located in the area known as Los Angeles Basin, and desires to have said oil, or a portion thereof, refined in said refinery;

"Now, Therefore, for, and in consideration of the mutual covenants herein contained, it is hereby agreed by and between the parties hereto as follows, to-wit:—"

The contract then proceeds to recite the terms, conditions, and price for which the party of the first part agrees to refine oil for the second party when it is delivered. Paragraphs 3 and 4 infer that it is optional on the part of the second party for it to deliver any quantity of oil for refinement. Paragraph 3 begins, "All oil de-

livered to," etc. The following paragraph reads: "Upon the delivery by the party of the second part to said refinery of any oil," etc. The contract contains not one promise on the part of the second party to deliver to the refinery any oil at all. The first paragraph of the contract specifically prescribes the limit of the quantity of oil which the first party agrees to refine. It reads: "It is hereby agreed by and between the parties hereto that the party of the first part will, at its Seal Beach refinery, refine a minimum of 400 barrels per day and maximum of 1500 barrels per day." But the second party does not agree to deliver that or any other quantity of oil per day. It will be observed that this contract may not be construed to be an exclusive agreement to refine all of the oil produced by the second party. It is apparent from the preceding quotation that the first party specifically refuses to accept from the second party less than 400 barrels per day, or more than 1,500 barrels per day. The contract specifically states that the first party reserves the right to refine oil for other producers.

[1] We are of the opinion the agreement is void for lack of consideration. It contains no promise on the part of the second party to deliver to the first party any quantity of oil whatever. It amounts to a mere conditional acceptance of the terms specified for refining oil by the first party in the event the second party sees fit to deliver oil for that purpose. It contains no mutuality of agreement between the respective parties with respect to the delivery of oil. It is therefore unenforceable.

[2] The appellant contends that the contract should be construed as a whole, as provided by section 1641 of the Civil Code and section 1858 of the Code of Civil Procedure, and that in so construing it, the preamble above quoted to the effect that the second party "desires to have said oil, or a portion thereof, refined in said refinery," must be inferred to be a promise or agreement to furnish to the first party some quantity of oil to be refined. We think not. It is too indefinite and uncertain. What quantity of oil does that preamble infer must be delivered? The contract specifies that the first party absolutely will not accept for refinement less than 400 barrels a day or more than 1,500 barrels per day. Can it be said, in the ab-

sence of a specification of any quantity to be delivered, that it may be inferred the second party must deliver at least the minimum amount which the first party will accept? We are not impressed with the logic of that contention. If the parties had intended to require a delivery of even a minimum quantity of oil, it would have been very easy to have expressed that promise in a direct statement to that effect. No such agreement appears in the instrument.

[3] It is true, as stated in section 1641 of the Civil Code, that the whole of a contract should be construed together so as to give effect to every part thereof, if it is reasonably practical to do so. And section 1858 of the Code of Civil Procedure provides that:

"In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

Construing the contract in accordance with the principles expressed in the two sections above referred to, and reading the agreement as a whole, we find an omission of any promise on the part of the second party to deliver to the first party any specified quantity of oil for refining. The second party has said in the preamble that it "has certain production from wells * * * and desires to have said oil, or a portion thereof, refined in said refinery." This language utterly fails to specify what quantity it promises to deliver or even the quantity it desires to have refined. Under the specific inhibition of the section last quoted, we may not "insert what has been omitted." Can it be reasonably said the second party agrees to deliver all of the output of its wells not exceeding 1,500 barrels per day, provided they produce more than 400 barrels a day? We think that construction of the contract would require the insertion of an omitted promise which would have been easy to have been expressed if the parties had so intended.

[4] The nature of the business of the appellant furnishes no aid in determining the intention of the parties with relation to the delivery of oil. The appellant conducts a general refining industry. It was

not dependent on the respondent's supply of oil. The contract merely fixes the terms, conditions, and price upon which it agrees to refine such oil as the respondent sees fit to deliver. It specifically reserves the right to refine oil for other producers. The mere fact that the respondent has a certain quantity of oil, which it "desires" to have refined may not be construed into an absolute promise to deliver it or any specific quantity thereof to the appellant for refinement. It is uniformly held that a contract which reserves in either party an option to deliver or to accept personal property, or which contracts for future delivery of personal property, the quantity of which delivery is dependent upon the will, wish, want, or desire of the other party, is void for lack of consideration and mutuality. *Gordon v. Emerson Shoe Co.*, Tex.Civ.App., 242 S.W. 791.

[5,6] In the case of *Foley v. Eules*, 214 Cal. 506, 6 P.2d 956, 957, a contract for processing, boxing, and marketing of Thompson seedless grapes, very similar to the present agreement chiefly because of the omission of a direct promise to deliver the property, was held to be void for lack of consideration because it was not mutually binding on the respective parties. In that case, as in the present one, the appellant contended that the agreement to deliver the crop of grapes was implied from a consideration of the entire instrument. In that case it is stated: "They [the respondents] desired to secure packing and marketing facilities for their crops." It is said the contract in that case provided that it was "to remain in force and effect until all the raisins delivered had been processed, sold, and delivered to buyers." From that and other similar statements of the contract, the appellant asserted "there was an implied covenant on the part of the respondents to cause all of the growers' raisins to be delivered." With that construction the court disagreed. The court said:

"We are now satisfied that the term for which appellant contends cannot fairly be implied from the contract as a whole or from any particular provision thereof. It would be to ask the court to go a long way in contract making. The Appellate Court properly held that the contract left to the

judgment or election of respondents the quantity of raisins to be delivered to appellant's packing plant. * * *

"Courts have been careful not to rewrite contracts for parties by inserting an implied provision, unless, from the language employed, such implied provision is necessary to carry out the intention of the parties."

The court quoted with approval from the case of *Loyalton, etc., Co. v. California, etc., Co.*, 22 Cal.App. 75, 133 P. 323, as follows:

"Where parties have entered into written engagements which industriously express the obligations which each is to assume, the courts should be reluctant to enlarge them by implication as to important matters. The presumption is that, having expressed some, they have expressed all, of the conditions by which they intended to be bound."

The court then said:

"With these rules of law in mind we cannot conclude that there was an implied obligation on the part of respondents to cause the pool members to deliver all of their raisins to appellant. The omission of such a covenant might have been intentional on the part of respondents. * * The executed contract was clear in its terms and left to the judgment of respondents the quantity of raisins to be delivered. Had appellant desired a covenant requiring a given number of tons of raisins or all of the growers' raisins to be delivered to him, he should have had such a provision inserted in the contract. We cannot rewrite the agreement for him."

The preceding language of the *Foley* Case applies to the terms of the contract in the present case. The conclusion reached in construing that contract appears to be determinative of the controversy in this case.

On the authority of *Foley v. Eules*, supra, and on principle, we are of the opinion the contract in this case is void for lack of mutuality.

The judgment is affirmed.

We concur: PLUMMER, J.; PULLEN, P. J.

25 Cal.App.2d 64

PEOPLE v. DANIELS.

Cr. 3025.

District Court of Appeal, Second District,
Division 1, California.

Feb. 15, 1938.

Rehearing Denied Feb. 28, 1938.

Hearing Denied by Supreme Court
March 17, 1938.

1. Licenses $\S$ 18 $\frac{1}{2}$

"Units," in promotion parlance, as applied to sale of securities without a broker's license, is used to describe a basis of investment in a venture and has been construed to mean a share or undivided proportionate interest in the projects and property of a syndicate. St.1917, p. 673, as amended.

[Ed. Note.—For other definitions of
"Unit," see Words & Phrases.]

2. Licenses $\S$ 18 $\frac{1}{2}$

The sale of undivided interests in oil land in units of $\frac{1}{100}$ of $\frac{1}{4}$ of an acre, without a broker's license, was not authorized as the "transfer of an interest in real property," but was unauthorized as the sale of "certificates of interest in an oil title" in violation of the Corporate Securities Act, notwithstanding that the conveying instruments were in the form of "grant deeds" purporting to convey interests in real property. St.1917, p. 674, as amended, $\S$ 2, subd. 7.

[Ed. Note.—For other definitions of
"Transfer of Interest," see Words &
Phrases.]

3. Licenses $\S$ 18 $\frac{1}{2}$

"Grant deeds" to undivided interests in oil land in units of $\frac{1}{100}$ of $\frac{1}{4}$ of an acre constituted "certificates of interest in an oil title" within statute prohibiting the sale of such securities without a broker's license, since size of units was conclusive that intent of vendor was to sell interest in possible oil production rather than to sell the land itself. St.1917, p. 674, as amended, $\S$ 2, subd. 7.

4. Licenses $\S$ 18 $\frac{1}{2}$

The Court of Appeal will not thwart the public policy of the state in the regulation of the sale of securities by permitting the mere form of instrument of transfer to control the construction of the Corporate Securities Act, but the purpose and effect of the instrument will be considered in determining whether its sale without a license

constitutes a violation of the act. St.1917, p. 673, as amended.

5. False pretenses $\S$ 7(3, 5)

A conviction for theft committed by means of false pretenses is not authorized unless representation is of a present or past fact, rather than a mere expression of opinion or a representation of an act to be performed in the future, as a mere promise to pay or perform some act, or as promising a future return on money invested.

6. False pretenses $\S$ 7(5)

A conviction of grand theft based upon representations allegedly made by defendant in selling interests in certain property to the effect that defendant represented an insolvent health association which owned lands from which a purchaser would realize an oil royalty each month was unauthorized.

7. False pretenses $\S$ 7(5)

A conviction of grand theft based upon representations allegedly made by defendant in the sale of undivided interests in certain property to the effect that the land being sold was at that time producing oil, which was false, and that a purchaser would realize income therefrom, was authorized.

8. Criminal law $\S$ 432

In prosecution for grand theft and for violation of the Corporate Securities Act by the sale of undivided interests in oil land represented by "grant deeds," introduction of certain deeds which defendant did not deny having executed or delivered and which defendant did not attempt to explain was not error. St.1917, p. 673, as amended; Code Civ.Proc. $\S\S$ 1948, 1951, 1963; Pen.Code, $\S$ 1102.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Thomas W. Daniels was convicted on three counts of grand theft and on three counts for violation of the Corporate Securities Act, and he appeals.

Affirmed, except as to first count charging grand theft, judgment of conviction upon which was reversed.

H. A. I. Wolch and G. Vernon Brumbaugh, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., R. S. McLaughlin, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Logan Lindley, and H. L. Arterberry, Deputy Dist. Attys., all of Los Angeles, for the People.

WHITE, Justice.

The defendant has appealed from a judgment pronounced against him and from an order denying his motion for a new trial following his conviction of several offenses alleged to have been committed by him by an indictment which contained seven separate counts; I, IV, and VI thereof charging grand theft, while counts II, V and VII alleged specific violations by the defendant of the Corporate Securities Act, St.1917, p. 673, as amended. During the trial, count III was dismissed. The jury returned separate verdicts finding the defendant guilty on all counts submitted to them.

The first contention advanced by the appellant relates to the offenses alleged in counts II, V, and VII. The last-mentioned counts in effect charged that appellant sold and issued designated securities without a broker's license permitting him so to do. The securities in which appellant thus dealt are described in the indictment as certificates of interest in a mining title, although the evidence shows that the instruments in question, if securities at all, were certificates of interest in an oil title. The record shows that as a necessary part of its case, in attempting to prove the commission by appellant of the offenses alleged in the last-named three counts, the prosecution introduced into evidence a number of written instruments. Each of the instruments thus produced is entitled "grant deed." One of the deeds thus entitled, which was executed by appellant, will serve to illustrate the main contention of appellant on this appeal. This deed purported to convey to Myrtle F. Joyce, one of the alleged "victims" named in the indictment, 4/100ths part of the north half of the south half of lot 18, Kettleman Oil Acres, being a subdivision of the north half of the northwest quarter of section 22, township 21 south, range 17 east, M. D. B. & M. The habendum clause of each of these instruments is the usual clause which appears in deeds conveying a fee title to land.

It is the contention of appellant that the various instruments introduced in evidence as aforesaid were deeds whereby interests in real property were transferred; that they do not come within the definition of "securities" as this term is defined in the California Corporate Securities Act; and that consequently there is not present in the case any evidence to justify a verdict of guilty against appellant on counts II, V, and VII of the indictment.

The word "security" is defined in section 2, subd. 7 of the Corporate Securities Act,

St.1917, p. 674, as amended. The portion of such definition upon which respondent relies for the claim that the grant deeds introduced into evidence come within the purview of said section is the following: "Certificate of interest in an oil, gas or mining title or lease." Respondent contends that appellant, in selling an undivided 1/100th part of 1/4 of lot 18, Kettleman Oil Acres, was selling a certificate of interest in an oil, gas, or mining title or lease.

[1] In the face of the conflicting contentions thus advanced, a recital of the factual background surrounding the execution and delivery of the deeds, as developed by the evidence presented at the trial, may be helpful. In the case before us the evidence shows that appellant, who had acquired a fee-simple title to the land in which he was dealing, contacted the parties mentioned in counts II, V, and VII with the statements that he was selling units to policyholders of International Travelers Health & Accident Association; that the company had gone into the hands of a receiver and had an oil property in litigation; that this was to be sold and distributed to the policyholders; and that the investors would get a royalty of from \$35 to \$40 per month for each unit purchased. The moneys paid to appellant were acknowledged by receipts given by him for units in Kettleman Oil Acres. Thereafter, appellant delivered to the investors the instruments styled "grant deeds" representing these units. These deeds covered undivided interests in a quarter acre. That the consistent use of the word "unit" by appellant in his conversations and receipts is somewhat significant, cannot be doubted, because in "promotion parlance" the term "unit" is used to describe a basis of investment in a venture, and it has been construed to mean a share or undivided proportionate interest in the projects and property of the syndicate. *Chew v. U. S.*, 8 Cir., 9 F.2d 348; *State v. Summerland*, 150 Minn. 266, 185 N.W. 255.

[2] Having in mind the concession which must be made that the various instruments denominated "grant deeds" are in form deeds, and that they purport to convey interests in real property; and further, that the term "securities" in its ordinary meaning does not cover deeds to real property; but remembering, as heretofore noted, that the Corporate Securities Act of California, in section 2, subd. 7 thereof, states that a certificate of interest in an oil, gas, or mining title or lease is a "security" for the

purpose of the act—we find no difficulty in concluding that the instruments under consideration here, although they are deeds in form, nevertheless in reality are nothing more or less than certificates of interest in an “oil or mining title,” and that they therefore come within the category of securities as that term is defined in the statute. As was said by the District Court of Appeal, Fourth District speaking through Mr. Justice Jennings, in an especially well-considered, comprehensive, and learned opinion, *People v. Jackson*, Cal.App., 74 P.2d 1085, 1090, involving questions strikingly analogous to the ones before us, “The deeds themselves show that what was intended to be conveyed thereby consisted of fractional interests in oil which might be produced from certain described land. No attempt was made to convey any other interest in the land. Undoubtedly, an owner of land may by suitable conveyance divest himself of his entire interest or a part thereof in whatever minerals may rest beneath the surface of the earth. There is nothing incomprehensible about dividing land horizontally as well as vertically. We suppose that the right or ownership of the landowner in the oil which is either known or suspected to be under the surface of the ground may be properly called an oil title just as we use the expression ‘land title’ to signify ownership of the surface which is the commonly accepted meaning of the expression ‘land title’ or ‘title in land.’” There is also in the record abundant evidence to the effect that defendant stated to the parties mentioned in the indictment that he wanted the vendee to buy the oil royalty; that, as one witness testified, “he wanted me to put some more money in on the oil royalty and he says I will have some big money every month.”

[3, 4] Nor are we deterred from our conviction that the instruments here in question come within the meaning of the statute by the fact that section 2, subd. 7 of the Corporate Securities Act uses the word “certificates,” while the instruments in the case at bar undoubtedly have the appearance and legal phraseology of deeds, with nothing in them indicating that they possess the character of mere certificates; because, although the instruments are in appearance deeds, and by their terms convey more extensive rights than certificates, they in fact come within the scope of instruments which under the statute can only be dealt in after issuance of a permit by the Commissioner of Corporations. We are fortified in arriving at this conclusion by looking through the

mere form of the instruments into the facts and circumstances which surrounded their execution as heretofore outlined. It is difficult to read these documents, together with the conversations and statements made by the defendant immediately preceding their execution, and not come to the conclusion that, notwithstanding the legal verbiage in which the transaction is clothed by such documents, they are, nevertheless, securities evidencing an interest in oil property.

Appellant purchased the entire acre of land here involved for less than \$500. He was selling 1/100ths of one-fourth of an acre, or multiples thereof, to purchasers in almost every instance at \$32.50 per unit, which would be at the rate of \$3,250 for the quarter of an acre, or \$13,000 for the acre. Figuring the size of the tract of land sold to the investors, to wit, 1/100th of a quarter of an acre, we find that the purchaser would have a tract of land consisting of 108.9 square feet, or a little more than 10 feet square, of wild, unimproved land, per unit. It is at once apparent that such an interest is an unsubstantial interest, and the purchaser thereof is actually precluded from the enjoyment of that interest in any other effective way than by receiving his proportionate share of the oil produced and brought to the surface by any lessee of sufficient of the land upon which an oil well or wells could be drilled. The amount of the unit interest in the case at bar was so infinitesimal as to exclude any other possibility than that the intent of this appellant and of these investors or purchasers was to sell or purchase interests in possible oil production. In other words, what in fact is a grant deed in words and form, within the definition of a grant deed, is also in substance and effect a “certificate of interest in oil, gas or mining title” within the evident purpose, intent, and meaning of the Corporate Securities Act. At most, in the light of the record herein, the deed is a mere disguise. We are unwilling by our construction of the Corporate Securities Act to make the mere form of such instruments as are here before us a barrier to the carrying out of the will of the Legislature to protect the public welfare. It would be a grave misfortune if by slavish adherence to form and blind disregard of substance, the declared public policy of the state in the regulation of the sale of securities were thus nullified by this court. *People v. Reese*, 136 Cal.App. 657, 29 P.2d 450; *People v. Craven*, 219 Cal. 522, 27 P.2d 906; *People v. Ratliff*, 131 Cal.App. 763, 772, 22 P.2d 245. The evidence in this case

satisfies us that all the transactions constituting the subject-matter of the indictment as to counts II, V, and VII were simply a scheme on the part of appellant to evade the Corporate Securities Act, and that the execution and delivery of the so-called "grant deeds" was simply a subterfuge, because the documents in question conveyed nothing but an interest in the title to oil-bearing land, and the clearly expressed legislative intent was that such an interest should be considered a security.

Appellant next challenges the sufficiency of the evidence as to counts I, IV, and VI, on each of which he was convicted of the crime of grand theft. In that connection, our inspection of the record reveals the fact that the incriminatory evidence, as it affected the offense charged in count I of the indictment, in substance was that the appellant represented to Myrtle F. Joyce that he was selling units for the Travelers Health Association at \$32.50 per unit; that the association in question had gone into the hands of a receiver at which time they had 80 acres in litigation; that Mrs. Joyce would get a royalty of \$35 to \$40 per month on each unit. There was also testimony to the effect that Mrs. Joyce relied upon the representations thus made.

As to count IV, the record indicates that the appellant made practically the same representations as above set forth to Mrs. Mary Graham; she testifying as follows: "He said I have some big income if I put that money in." When the witness was asked whether appellant stated what the money was to be used for, she said he replied, "For the oil royalty." Further in the testimony of this witness we find her stating that on one occasion during a conversation with appellant, "he wanted me to put some more money in on oil royalty, and he says I will have some big money every month. * * I was going to start getting some the next month." When asked by the district attorney, "Did you believe the statements made to you by Mr. Daniels regarding this land as being oil land?" the witness replied, "Well, the way he told me, I thought I would get a large income every month like he told me." Moreover, in connection with the evidence as to this count, we find in the record the following:

"Q. Mr. Daniels told you if you would buy those percents you would have a large income, and you relied upon that statement, that is why you purchased these percents and turned over the money? A. Yes.

"Q. And that was the only reason you delivered the money over? A. Yes, because he said it was producing oil and I would have some big income every month.

"Q. He said it was producing oil at that time? A. Yes.

"Q. That particular land was producing oil? A. Yes, that it what he said."

It might here be noted in connection with count IV that there was evidence of the falsity of the statements of the defendant that this particular land was producing oil. This testimony was supplied by a petroleum geologist, who stated that the nearest production on the west was 1½ miles, to the north 20 to 25 miles, and to the east 60 miles or so; and the same witness also testified that the particular land involved here lies in the San Joaquin valley and will furnish agricultural products if irrigated.

As to count VI, the indictment charged the willful, unlawful, and felonious taking of another and different sum from Mary Graham than that mentioned in count IV, and that the taking was upon another and different occasion than that mentioned in count IV, and the representations made were similar to those testified to in connection with said count IV.

[5, 6] It is more than doubtful that any of the representations, or all of them combined, as applied to count I, may be said to measure up to the standard defined by judicial interpretation of the statutes which relate to the crime of theft committed by means of false pretenses. In 12 California Jurisprudence at page 452, the rule is declared to be "that the representation must be of a present or past fact, not a mere expression of opinion, or a representation of an act to be performed in the future, as a mere promise to pay or perform some act. * * " It is the universal rule that the false pretenses must relate to a past or existing fact, and that the crime is not committed where the inducement is a promise to perform some act in the future, such as promising a future return upon money invested, such as was guaranteed by the defendant herein, so far as count I is concerned. 24 A.L.R. 402; *People v. Mace*, 71 Cal.App. 10, 21, 234 P. 841; *People v. Reese*, supra; *People v. Kahler*, 26 Cal.App. 449, 147 P. 228; *People v. Green*, 22 Cal.App. 45, 133 P. 334; *In re James*, 47 Cal.App. 205, 190 P. 466; *People v. Walker*, 76 Cal.App. 192, 205, 244 P. 94; and authorities there cited. The evidence, therefore, as to count I of the in-

dictment, is insufficient to sustain the judgment.

[7] Measured by the aforesaid standards, the unequivocal representations testified to as having been made by appellant as to material present and existing facts, the falsity of which was established, amply sustains the judgments as to counts IV and VI.

[8] Appellant further complains that the court fell into error in permitting the prosecution to introduce into evidence certain deeds; but upon the authority of sections 1948, 1951, and 1963 of the Code of Civil Procedure, and section 1102 of the Penal Code, appellant's contention in this respect is without merit. See, also, *Thomas v. Fursman*, 177 Cal. 550, 171 P. 301; *Ware v. Julian*, 122 Cal.App. 354, 9 P.2d 906; *Davis v. Pacific Improvement Co.*, 118 Cal. 45, 49, 50 P. 7. At his trial appellant at no time denied the due execution or delivery of the documents offered and introduced into evidence, nor did he attempt to explain them in

any way; and when these matters were touched upon on cross-examination of appellant, objection was made by his counsel, which objection was sustained by the trial court on the ground and for the reason that the matter had not been touched upon on direct examination. Other evidence elicited during the trial, which was neither denied nor explained by appellant, was sufficient to establish the foundational facts necessary to warrant the trial court in admitting the documents into evidence.

For the reasons herein set forth, it is ordered that the judgment of conviction herein upon count I and the order denying appellant's motion for a new trial upon that count are reversed; it is further ordered that the judgments of conviction upon the other counts of the indictment be, and each of them is, affirmed, and the order denying appellant's motion for a new trial as to all counts other than count I is affirmed.

We concur: YORK, P. J.; DORAN, J.

11 Cal.2d 1

BARTON v. LUDY.

Sac. 5141.

Supreme Court of California.

Feb. 25, 1938.

1. Partnership Ⓒ217(1)

Under the statutes relative to the authority of a partner, and also independent of statutory authority, one of two lessees resisting partition sought by an assignee of the other lessee, on the ground that the leasehold interest is partnership property, has the burden of proving not only the lack of authority of the other lessee to make the assignment but also that the assignee had knowledge of such lack of authority. Civ. Code, §§ 2403(1), 2404(4).

2. Partnership Ⓒ217(1)

The statute placing the burden of proof on one claiming partnership property against the partnership as a bona fide purchaser without knowledge is limited to an action brought by a partnership to recover its assets and has no application to an action for partition brought by an assignee of one partner. Civ. Code, § 2404(3).

3. Partnership Ⓒ160

The fact that an assignment by one of two lessees of his rights as lessee purports to transfer only his interest does not prevent the assignee from claiming as a holder for value and without notice, as against the claim that the property is partnership property of the two lessees.

In Bank.

Appeal from Superior Court, Glenn County; R. M. Rankin, Judge.

Action by Beulah A. Barton against Wirt Ludy for partition of a leasehold interest in real estate. From a judgment for plaintiff, defendant appeals.

Affirmed.

Grayson Price, of Chico, and H. S. Clewett, of Pasadena, for appellant.

Geis & Hogle and Clyde H. Larimer, all of Willows, for respondent.

EDMONDS, Justice.

The appellant in this case is a lessee of real estate and the respondent is the assignee of his colessee. The latter brought an action for partition of the leasehold interest and was awarded judgment. The

appellant claims that the lease was made to him and his colessee as partners and is partnership property; that the title transferred by the assignment is subject to the interest of the partnership and that the respondent is not entitled to partition.

The property in controversy consists of 255 acres of land in Glenn county and is part of one of the farms which was leased by Sarah E. Ludy to her two sons, John Ludy and the appellant. By the terms of this agreement, which was recorded, Mrs. Ludy leased her property to "Wirt Ludy and John Ludy" without further description of the interest created in the lessees. Later, Mrs. Ludy died and upon the administration of her estate, the respondent, who is her daughter and the sister of Wirt and John Ludy, became the owner of the 255 acres of land which is now in dispute. John Ludy then transferred to the respondent by a written "assignment" his "rights as lessee" in the 255 acres of land to which the respondent had acquired title and she brought this action against her other brother as a tenant in common with her of the leasehold.

The issue between the parties is presented by the separate defense of the appellant. He pleaded that he and his brother John were partners and took the lease as such; that no assignment of any interest in the lease had been made by the partnership and that the leasehold interest is partnership property. Upon this issue the trial court found that the brothers had acquired the lease and had farmed the land as partners but that the partnership was secret and undisclosed as to respondent, and that, as to her and as to her mother before her, the lessees held the lease merely as cotenants. It further found that respondent was a transferee of John Ludy's undivided one-half interest in the leasehold of the 255 acres for a valuable consideration and without notice of the partnership.

[1] The appellant makes his chief attack upon the sufficiency of the evidence to support these findings. He contends that the evidence offered by the respondent, consisting of the lease, the assignment to her by John Ludy and the decree made in the administration of the estate of Sarah E. Ludy distributing the 255 acres of land, subject to the lease, to her, does not entitle the respondent to a partition of the leasehold interest in this property. The respondent rests her case upon the proposition that the appellant had the burden of proof to sustain his position and did not meet this require-

ment. She contends that the evidence that for fifteen years he and his brother, "as partners," had farmed the land leased to them by their mother, does not establish a partnership interest which will defeat the title shown by her.

Section 2404 of the Civil Code reads in part as follows: "(4) Where the title to real property is in the name of one or more or all the partners, or in a third person in trust for the partnership, a conveyance executed by a partner in the partnership name, or in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of section 2403." The section referred to provides: "(1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on [in] the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority." These provisions, which are a part of the Uniform Partnership Act added to the law of this state in 1929, St.1929, p. 1897, required the appellant to prove not only his brother's lack of authority to make an assignment but also that his sister had knowledge of that fact. The same rule has been applied without statutory authority. In *Dimity v. Dixon*, 74 Cal.App. 714, 719, 241 P. 905, it was held that the law casts upon one seeking to impress a trust upon property of a partnership which has been held in the name of one of the partners and conveyed by his heirs after his death, the burden of showing that the grantee was either not a purchaser for value or that she took title with knowledge of the alleged infirmities. Undoubtedly the reason for such a rule is that at common law a partnership was a trust relationship; hence a partner suing to recover trust property is in a situation, similar to that of a beneficiary of a trust who brings an action to recover trust property alleged to have been conveyed in violation of the terms of the trust. In such a case and where the trustee held title without terms indicating the trust, "it has been invariably held," this court said in *Bell v. Pleasant*, 145 Cal. 410, 78 P. 957, 958, 104 Am.St.Rep. 61, that it is incumbent upon the

plaintiff "not only to prove the facts establishing a trust, but also to prove that the grantee of the trustee took his conveyance with notice of the equities of the plaintiff." The same conclusion was reached in *Kowalsky v. Kimberlin*, 173 Cal. 506, 160 P. 673, 674, where the court said: "The burden of proof was upon plaintiff to show due and sufficient notice to defendant of matters outside the record title tending to establish any resulting or constructive trust in plaintiff's favor."

The cases cited by appellant are not at variance with these conclusions. *Azevedo v. Sequeira*, 132 Cal.App. 439, 22 P.2d 745, involved merely the rights of the partners as between themselves to certain property after dissolution of the partnership. The case of *Perelli-Minetti v. Lawson*, 205 Cal. 642, 272 P. 573, while nearer the mark, is still not controlling. There the plaintiffs were the heirs of a deceased partner who sought to partition the partnership property which had been held in cotenancy. The court held that the surviving partner had the right under section 1585 of the Code of Civil Procedure (now section 571 of the Probate Code) to continue in possession for the purpose of winding up the partnership affairs. No rights of third persons were involved.

[2] The appellant insists that the provisions of subdivision 3 of section 2404 of the Civil Code places the burden of proof on one claiming partnership property against the partnership as a bona fide purchaser without knowledge. But that provision is limited by its terms to an action brought by a partnership to recover its assets; it has no application here.

[3] Another contention of the appellant is that the respondent may not claim as a holder for value and without notice because her assignment from John Ludy purports to transfer only the interest he had. "That a deed conveys merely 'the right, title and interest' of the grantor does not prevent the grantee from being a purchaser for a valuable consideration, without notice, within the recording laws, so as to be protected from unrecorded instruments affecting the title to the property of which he had no notice." *Beach v. Faust*, 2 Cal.2d 290, 293, 40 P.2d 822, 823.

The judgment is affirmed.

We concur: CURTIS, J.; LANGDON, J.; SHENK, J.; HOUSER, J.

10 Cal.2d 689

VASSERE v. JOERGER.

Sac. 5167.

Supreme Court of California.

Feb. 16, 1938.

1. Master and servant ⇨80(4)

A complaint, alleging defendant's indebtedness to plaintiff's assignor for services rendered in stated sum and written acknowledgments and agreements to pay such indebtedness, no part of which was paid, was good as against general demurrer for failure to state cause of action.

2. Limitation of actions ⇨151(2)

An acknowledgment of debt before statute of limitations has run merely vitalizes debt for another statutory period and action therefor is on original obligation, while action for debt acknowledged after statute has run is on new promise, for which old debt is consideration. Code Civ.Proc. § 339; § 337, as amended by St.1933, p. 2116.

3. Limitation of actions ⇨180(2)

A demurrer to complaint as stating cause of action barred by statute of limitations does not lie, where complaint merely shows that action may have been barred, as it must affirmatively appear from facts alleged that right of action is necessarily barred to warrant demurrer on such ground.

4. Limitation of actions ⇨179(3)

A complaint, alleging that defendant became indebted to plaintiff's assignor for services rendered within four years before February 15, 1935, on which date action was commenced, and acknowledged and agreed to pay such indebtedness in writings dated February 14, 1931, March 4, 1932, and August 23, 1932, did not necessarily show on its face that action was barred by two-year statute of limitations. Code Civ.Proc. § 339.

5. Limitation of actions ⇨179(3)

An opening allegation of complaint "that within four years last past next preceding the commencement of this action said defendant became indebted" to plaintiff's assignor for services rendered did not indicate that original obligations were incurred within four years, and hence that subsequent written acknowledgments thereof were made before running of two-year limitation period thereon, where first acknowledgment, set out in complaint, bore date more than four years before commencement of action; such allegation referring to new promises, con-

tained in or implied from acknowledgments, to pay debt. Code Civ.Proc. § 339; § 337, as amended by St.1933, p. 2116.

6. Limitation of actions ⇨151(4)

An action on promise to pay amount, acknowledged in writing to be due on date less than four months before suit, was instituted in time, though such acknowledgment bore date more than four years before commencement of action. Code Civ.Proc. § 337, as amended by St.1933, p. 2116.

7. Limitation of actions ⇨151(3)

A written acknowledgment of indebtedness "for wages due to date" did not necessarily and exclusively imply that debt accrued immediately before acknowledgment so as to show that latter was made before running of two-year period of limitation. Code Civ.Proc. § 339.

8. Limitation of actions ⇨179(3)

A complaint, alleging defendant's indebtedness to plaintiff's assignor for services rendered and acknowledgment thereof in three writings, first of which certified that defendant owed assignor stated sum "for wages due to date," was not demurrable as stating cause of action barred by two-year statute of limitations, even if quoted words implied that debt accrued immediately before such acknowledgment, where such expression did not appear in subsequent acknowledgments. Code Civ.Proc. § 339.

9. Limitation of actions ⇨180(1)

A demurrer to complaint as stating cause of action barred by statute of limitations may not properly be sustained, if any part of cause be not barred.

10. Limitation of actions ⇨149(1), 151(5)

Only general, unconditional acknowledgment of or promise to pay debt while original obligation is legally enforceable constitutes continuing contract vitalizing original debt for additional period, and action, brought after statutory time for enforcement of original obligation, which debtor conditionally promised during such time to pay, is on substituted conditional promise.

11. Limitation of actions ⇨151(2)

An employer's written acknowledgment and express promise to pay employee stated sum "for wages due to date" on or before later date was not general, unconditional promise to pay debt, but offer to pay it on condition of forbearance to sue, which ripened into binding unilateral contract, governed

by four-year, not two-year statute of limitations, on actual forbearance to sue within such time. Code Civ.Proc. § 337, as amended by St.1933, p. 2116; § 339.

12. Limitation of actions Ⓒ151(2)

An employer's written acknowledgments of and promises to pay sum due employee for additional wages, with 7 per cent. interest, were governed by four-year statute of limitations, so that action, brought within such time after dates thereof, for amount of indebtedness was not barred, in absence of anything in complaint to show that such acknowledgments did not represent settlement or compromise agreements between parties. Code Civ.Proc. § 337, as amended by St.1933, p. 2116.

13. Pleading Ⓒ320

An employer's written admission and acknowledgment of his indebtedness to employee in specific sums for wages due precluded him from demanding bill of particulars from plaintiff in action by employee's assignee for total amount due.

In Bank.

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Action by Attilio Vassere against Louis P. Joerger to recover an amount due plaintiff's assignor for services rendered to defendant. From a judgment of dismissal, plaintiff appeals.

Reversed, with directions.

Prior opinion, 68 P.2d 363.

W. H. Morrissey, of Redwood City, for appellant.

Carter & Barrett, of Redding, for respondent.

Carter, Barrett, Finley & Carlton, of Redding, amici curiæ.

WASTE, Chief Justice.

Plaintiff appeals from a judgment of dismissal entered upon the sustaining of a demurrer to an amended complaint without leave to amend.

The action was commenced on February 15, 1935. It is alleged in the complaint that within four years last past the defendant became indebted to plaintiff's assignor for services rendered in the sum of \$1,622.13, and in writings acknowledged, signed, and agreed to pay said indebtedness. The complaint then alleged that no part

of the amount had been paid and prayed for judgment.

The acknowledgments and agreements to pay, which are written on a single sheet of paper, are set out in hæc verba in the complaint, as follows:

"Feb. 14, 1931

"This is to certify that I, Louis P. Joerger, owe John Vassere \$776.69 for wages due to date with interest included to date and promise to pay same on or before March 1st, 1931. Interest to be charged from this date to March 1st at rate of 7% per annum.

"Louis P. Joerger."

"March 4th, 1932.

"This is to certify that I owe John Vassere \$496.44 for additional wages with interest at the rate of 7%.

"Louis P. Joerger."

"August 23rd, 1932.

"This is to certify that I owe John Vassere \$349.00 for additional wages with interest at 7%.

"Louis P. Joerger."

[1] Defendant demurred on the grounds that the complaint failed to state a cause of action and that the action was barred under the two-year period of limitation prescribed in section 339 of the Code of Civil Procedure. It was sustained, without leave to amend, upon the latter ground. We pass the general demurrer with the observation that it is not well taken.

[2] It is the plaintiff's theory upon this appeal that the action is based upon the written acknowledgments and promises therein contained (express and implied), and that the action was therefore timely commenced, having been brought within four years after the due date therein fixed. Section 337, Code Civ.Proc., as amended by St.1933, p. 2116. Defendant and respondent, on the other hand, relies on the rule announced in *Southern Pac. Co. v. Prosser*, 122 Cal. 413, 52 P. 836, 55 P. 145, 147, and other cases, to the effect that a distinction exists between the acknowledgment of a debt before the statute has run and an acknowledgment after the statute has run, the former merely vitalizing the old debt for another statutory period from the date of the acknowledgment, the action, in such case, being upon the original obligation, while in the case of an acknowledgment after the statute has run, the action is upon the new promise for which the old debt is a consideration.

In the cited case the rule is stated as follows: "When a debtor makes a new promise before an action is barred upon the original contract, he does not make himself liable a second time for the same debt, and the old promise is not merged in the new. He merely continues his original liability for a longer term. In other words, he merely waives so much of the period of limitations as has run in his favor. But when his legal obligation is at an end, by reason of the lapse of the full period of limitation, or of a discharge in bankruptcy, a new promise creates a new obligation, and is itself the basis of the action."

Under this rule, the acknowledgments in the present case, if made prior to the running of the two-year period of limitation governing the original obligations, which obligations were not founded in a writing, would have served merely to extend the period an additional two years from the date of each of such acknowledgments or the time for payment therein prescribed and the action, not having been commenced within two years thereafter, would be barred. *National Cycle Co. v. San Diego Cycle Co.*, 9 Cal.App. 111, 113, 98 P. 64; *Gilmore v. Green*, 77 Ky. 772, 775, 776, 14 Bush 772. However, if the acknowledgments were made after the statute had fully run on the original oral obligations, they would constitute new promises, even though such promises be merely implied therefrom (*Maurer v. Bernardo*, 118 Cal.App. 290, 294, 5 P.2d 36), and, being in writing, the action would be governed by the four-year period.

[3,4] While we recognize the rule relied on by the defendant, we are not satisfied that it has been correctly applied to this case by the trial court. Preliminary to pointing out wherein the rule has been improperly applied to the complaint here involved, we pause to state that it is well settled that "a demurrer on the ground of the bar of the statute of limitations does not lie, where the complaint merely shows that the action may have been barred. It must appear affirmatively that, upon the facts stated, the right of action is necessarily barred." *Pike v. Zadig*, 171 Cal. 273, 277, 152 P. 923, 925; *Curtiss v. Aetna Life Ins. Co.*, 90 Cal. 245, 250, 27 P. 211, 25 Am.St.Rep. 114. With this principle in mind, we fail to perceive in the complaint any allegation tending to show that the acknowledgments therein

set forth and relied on by the plaintiff were made at a time prior to the running of the two-year period on the original oral obligations so as to merely vitalize said original obligations for an additional two-year period. On the contrary, and for all that appears on the face of the complaint, it is reasonably possible to construe the same as relying on acknowledgments made after the running of the statute on the original obligations so as to constitute new written promises, express or implied, as to which the period of limitation would be four years. This being so, it does not "necessarily" appear from the face of the complaint that the action is barred, so as to warrant the sustaining of the demurrer. *Pike v. Zadig*, supra.

[5,6] In opposition to this reasoning, it may not properly be contended that the opening allegation of the complaint to the effect "that within four years last past next preceding the commencement of this action said defendant became indebted," etc., is indicative of the fact that the original obligations were incurred within four years, thus necessarily causing the acknowledgments thereof to have been made prior to the running of the two-year period of limitation on the original obligation, for the reason that it definitely appears that the first acknowledgment is dated "Feb. 14th, 1931," and the action was commenced February 15, 1935, *more* than four years thereafter. Obviously, if an acknowledgment of a debt was made more than four years prior to the commencement of the action, the debt itself could not have been incurred within four years of such commencement. This necessarily tends to disclose that the above-quoted allegation has reference to the new promises contained in or implied from the acknowledgments, and definitely indicates that plaintiff and appellant is suing upon such new promises. In passing, and merely to preclude confusion, it should be stated that the first acknowledgment, though bearing date more than four years prior to the commencement of the action, contains an express promise to pay the amount therein acknowledged to be due on "March 1st, 1931," which was less than four years prior to suit, and the action thereon was therefore instituted within time.

[7-9] Nor do we think the statement in the first acknowledgment "for wages due to date" necessarily and exclusively implies that the debt for wages so ac-

knowledge accrued immediately prior to such acknowledgment so as to cause the acknowledgment to have been made prior to the running of the two-year period on the original debt. Such statement is equally consistent with an accruing of said debt at a more distant period. But, be that as it may, the last-quoted expression does not appear in the remaining two acknowledgments of other and additional debts for wages owing to plaintiff's assignor and the same are not subject thereto. A demurrer based on the statute of limitations may not properly be sustained if any part of the cause of action be not barred. *Etchas v. Orena*, 127 Cal. 588, 591, 60 P. 45.

[10,11] In our treatment of this case up to this point we have proceeded upon the theory that the complaint does not on its face disclose that the acknowledgments were made prior to the running of the two-year statute upon the original obligations, so as to merely vitalize said original obligations for an additional two-year period, which would have expired prior to the commencement of this action, but rather that the complaint is equally consistent with the theory that the acknowledgments were made subsequent to the running of the statute so as to constitute new promises in writing as to which the period of limitation would be four years. However, even if we assume for present purposes that the complaint discloses that the acknowledgments were made prior to the running of the statute upon the original obligations, we still would be of the view that the demurrer was improperly sustained. In concluding that an acknowledgment or promise, made while the original obligation is legally enforceable, constitutes a "continuing contract" which merely vitalizes the original debt for an additional period, defendant and the trial court failed to perceive that this result follows, under the authorities, only when the acknowledgment or promise is general and unconditional. If, however, an acknowledgment or promise, made while the original obligation is legally enforceable, "be not a general promise to pay the obligation according to its tenor and terms, but is a promise coupled with any condition, and an action is brought after the statute of limitations would have barred the remedy upon the original obligation, the action of plaintiff is then upon the substituted, conditional promise, and not upon the original obligation." *Rodgers*

v. Byers, 127 Cal. 528, 530, 60 P. 42, 43; *Morehouse v. Morehouse*, 140 Cal. 88, 92, 73 P. 738; *Maurer v. Bernardo*, supra, 118 Cal.App. 290, 294, 5 P.2d 36.

Therefore, regardless of whether made prior or subsequent to the running of the statute upon the original obligation, it definitely appears that the acknowledgment and express promise first above quoted, wherein on "Feb. 14th, 1931," the defendant acknowledged his then indebtedness to plaintiff's assignor for wages in the sum of \$776.69, is not a general and unconditional promise but, on the contrary, is a qualified and conditional promise to pay, with interest, the debt then admittedly due, at a future date, to wit, "March 1st, 1931." In effect, this constituted an offer to pay on condition of forbearance to sue which, when followed, as here, by an actual forbearance to sue, gave rise to a binding unilateral contract. This new and conditional promise, which thereafter ripened into a binding unilateral agreement, being in writing, is governed by the four-year period of limitation, and the present action thereon was commenced within time. As already stated, if any part of the cause of action was not barred, it was improper to sustain a demurrer to the entire complaint based on the statute of limitations (supra).

[12] Moreover, and the complaint is devoid of anything to the contrary, the acknowledgments of March 4 and August 23, 1932, with their express promises for the payment of interest at the rate of 7 per cent. from the dates thereof upon the respective additional amounts therein admitted to be due and owing to plaintiff's assignor, may well have been the result of understanding or agreement between the parties. In other words, they may well represent settlement or compromise agreements between the parties and, a memorandum thereof being in writing, they are governed by the four-year period.

[13] What we have said sufficiently discloses the error of the trial court in sustaining the demurrer. We are of the opinion that it also effectively disposes of the additional point urged on behalf of the defendant and respondent to the effect that the judgment of dismissal was proper if for no other reason than that the plaintiff and appellant failed to furnish a bill of particulars, as required by court order made pursuant to defendant's motion therefor. The defendant having in writing ac-

knowledge and promised, either expressly or impliedly, to pay to plaintiff's assignor with interest the three specific sums here sued for as the result of an understanding or agreement of settlement or compromise, or otherwise, was not in a position to demand a bill of particulars. Defendant's written admission and acknowledgment that the several items here sued on were due and owing to plaintiff's assignor forecloses him from exercising the right of examining them by way of demanding a bill of particulars. *Henning v. Clark*, 46 Cal.App. 551, 555, 189 P. 714; *Converse v. Scott*, 137 Cal. 239, 70 P. 13.

For the foregoing reasons, the judgment is reversed, with directions to the trial court to proceed in accordance with the views herein expressed.

We concur: HOUSER, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; EDMONDS, J.



10 Cal.2d 723

RAGGIO v. MALLORY et al.

S. F. 15873.

Supreme Court of California.

Feb. 24, 1938.

Rehearing Denied March 25, 1938.

1. Appeal and error ⇐930(1)

On appeal, all conflicts in evidence must be resolved in respondent's favor and all legitimate and reasonable inferences indulged to uphold the verdict.

2. Appeal and error ⇐989

Where verdict is attacked as unsupported by the evidence, appellate court's power begins and ends with determination whether there is any substantial evidence, contradicted or uncontradicted, which will support verdict.

3. Appeal and error ⇐996

When two or more inferences can reasonably be deduced from the facts, reviewing court may not substitute its deductions for those of trial court.

4. Appeal and error ⇐1002

The jury's implied finding from conflicting evidence that minor had jumped back-

ward from curb into path of automobile was binding on the Supreme Court.

5. Automobiles ⇐226(2)

A motorist is liable for injuries sustained by a pedestrian as the result of motorist's negligence in operation of automobile unless pedestrian is guilty of contributory negligence which proximately causes the injury.

6. Automobiles ⇐244(55)

Evidence that 12 year old boy of normal intelligence, and familiar with automobile traffic passing over bridge upon which he stood, jumped backward without warning and without having looked for approaching vehicles from position of safety on curb into path of automobile which ran over him, authorized denial of recovery for injuries sustained on ground of contributory negligence, irrespective of motorist's negligence.

7. Infants ⇐102

Whether an infant is sui juris is usually for the jury unless the child is exceedingly young, but, if there is no doubt as to the child's capacity to avoid damage, the court will decide capacity as a matter of law.

8. Appeal and error ⇐1066

Where recovery for injuries sustained by minor son when run over by automobile was barred by contributory negligence, an instruction on the doctrine of imminent peril relating solely to the acts of the motorist was not prejudicial error, though unsupported by the evidence.

9. Appeal and error ⇐1066

Where recovery for injuries sustained by minor when run over by automobile was barred by contributory negligence, an instruction which was unauthorized under the facts to the effect that motorist was presumptively exercising ordinary care and obeying the law immediately prior to and at the time of the accident was not ground for reversal.

In Bank.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by John Raggio, a minor, by Giuseppe Raggio, his guardian ad litem, and another against Barbara Mallory and others to recover damages for injuries sustained by the named plaintiff when run over by an automobile operated by the

named defendant. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Prior opinion, 67 P.2d 738.

Martinelli & Gardiner, of San Rafael, and Herbert Chamberlin, of San Francisco, for appellants.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for respondents.

CURTIS, Justice.

This is an appeal from a judgment against the plaintiffs in a personal injury action brought by the two plaintiffs, father and minor son, against the defendants. Defendant Barbara Mallory is a minor, and the two other defendants are her parents. The injuries were sustained by the minor plaintiff by being run over by an automobile driven by Barbara Mallory. The automobile was owned by her parents at the time of the accident, and they also had signed the application of Barbara Mallory to the State Motor Vehicle Department for a driver's license. In their appeal from the judgment against them, the plaintiffs contend that the evidence was insufficient to support the verdict of the jury and the judgment based upon said verdict, and that the court erroneously instructed the jury.

[1-3] The rule respecting the powers of an appellate court in reviewing the evidence on appeal from a judgment on the ground of the insufficiency of the evidence to support the judgment has been so often stated by this court that a repetition of said rule at this time would seem unnecessary. A recent statement of that rule by this court is reported in the case of *Bellon v. Silver Gate Theatres, Inc.*, 4 Cal.2d 1, 13, 47 P.2d 462, 468. It will suffice for the purpose of this appeal to merely repeat what is there said in reference to said rule. In that case the rule was stated in the following language: "In reviewing the evidence on such an appeal, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury.

When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court."

[4] With this rule to guide us, we will proceed to an examination of the record for the purpose of ascertaining whether there is any substantial evidence therein to support the judgment in this case. The accident happened on the Alto bridge in Marin county at about 4 o'clock in the afternoon of December 5, 1934. The plaintiff minor, 12 years of age, with other boys of about his own age, was walking along said bridge when an electric train passed under the bridge. The boys went to the side of the bridge to look at the train. John Raggio, the minor plaintiff, stepped upon the wooden curb or wheel guard which was constructed along the side of the bridge adjacent to the roadway over the bridge. It was about 6 inches high and the same in width. There was a railing along the side of the bridge something like 3 feet in height. John Raggio stood on this curb, leaned over the railing, and watched a train passing under the bridge. Barbara Mallory with her mother was driving over the bridge. When they entered upon the bridge, the speed of their machine was between 35 and 40 miles an hour. This speed was reduced to between 25 and 30 miles per hour immediately after they drove upon the bridge, and this speed was maintained up to the time of the accident. At a point 150 to 200 feet from the boys, the driver of the automobile saw the boys, and at that time John Raggio was leaning over the railing evidently watching the train. When within 20 to 30 feet from him, the driver of the car sounded her horn two to four times. None of the boys gave any indication that he heard the horn, but one of them testified that he heard it. Just as the car arrived opposite John Raggio, he suddenly jumped back into the path of the car and was run over and injured. Immediately before John jumped off the curb, he had been throwing little clods of earth on the train. One of these clods of earth hit the train, and John jumped back, apparently to keep the conductor of the train from seeing him. The Alto bridge is 760 feet in length and the paved portion thereof is 21 feet in width with a white line down the center thereof. At and immediately prior to the accident, the machine operated by Barbara Mallory was being driven midway between this

white line and the 6-inch curb along the north side of the bridge. Another car was approaching the scene of the accident from the opposite direction from which the Mallory car was being driven at the time of the accident. The theory upon which the plaintiffs based their case was that John was struck while standing on the 6-inch curb and that he neither stepped down nor jumped from the curb immediately before being struck by the automobile. The verdict of the jury against plaintiffs has eliminated this evidence from our consideration. The contention of plaintiffs that the evidence fails in any substantial measure to support the judgment is predicated in the main upon the fact that John Raggio was a minor and due to that fact the conduct of Barbara Mallory in the operation of the car that ran over John Raggio shows that she was negligent and that the minor was free from any act of negligence which contributed to his injury.

The plaintiffs, who will be referred to hereafter as appellants, based their contention that the judgment is lacking in evidentiary support upon the fact that John Raggio, the minor appellant, was at the time of the accident a boy of the age of 12 years only, and therefore a greater degree of care was required of the driver of the car in approaching the point on the bridge where he was standing than if he had been an adult, and that said minor on account of his age, and the circumstances under which he was injured, was not guilty of negligence.

[5] If the driver of the Mallory machine was negligent in the operation of the car she was driving, then the plaintiffs were entitled to recover unless the minor was guilty of contributory negligence which proximately caused his injuries. It is unnecessary to discuss the question as to whether the driver of the Mallory car was negligent, as we are convinced that the implied finding of the jury that the minor was guilty of negligence which was the proximate cause of his injury finds ample support in the evidence.

[6] The irresistible conclusion that must be drawn from the evidence is that the sole cause of the minor's injury was his sudden jumping backward just as the car arrived opposite the place where he was standing. There is no doubt that had John Raggio been a person of mature years he would have been held to be guilty of negligence. *Hatzakorzian v. Rucker-Fuller*

Desk Co., 197 Cal. 82, 95, 239 P. 709, 41 A. L.R. 1027. He left a position of safety on the 6-inch curb and, without warning and without looking to see whether any vehicles were approaching, heedlessly stepped or jumped back into the path of the approaching car. The minor was then 12 years of age and of normal intelligence of a boy of that age. He lived in the vicinity in which the bridge was located. He knew it was a part of the main highway and was familiar with the automobile traffic passing over the bridge. Under these circumstances, he was subject to the doctrine of contributory negligence. *Moeller v. Packard*, 86 Cal.App. 459, 261 P. 315; *Richardson v. Ribosso*, 120 Cal.App. 641, 8 P.2d 226; *Studer v. Southern Pacific Company*, 121 Cal. 400, 53 P. 942, 66 Am.St. Rep. 39; *De Nardi v. Palanca*, 120 Cal. App. 371, 8 P.2d 220; *Greeneich v. Knoll*, 73 Cal.App. 1, 238 P. 163; 2 Cal.Jur.Ten Year Supp. §§ 277, 278, pp. 441, 443, 445.

[7] In the case of *Moeller v. Packard* supra, it was held that a girl 8½ years of age was guilty of contributory negligence in suddenly running in front of an automobile traveling upon the highway. In that case the court on page 467 of 86 Cal.App., 261 P. 315, 319, quoted with approval the following statement from Beach on Contributory Negligence: "It is a question of capacity, and it has been found a very difficult question, and has been, in many cases, a very fruitful source of controversy as to what age is sufficient to constitute an infant sui juris. Unless the child is exceedingly young it is usually left to the jury to determine the measure of care required of the particular child in the actual circumstances of the case. Where there is no doubt as to the capacity of the child, at one extreme or the other, to avoid damage, the court will decide it as a matter of law." Beach on Contributory Negligence, § 117."

In the case of *Richardson v. Ribosso*, supra, the injured minor was only 7 years of age. He suddenly ran across the street upon which the defendant was traveling and ran into the automobile driven by the defendant in that action. He was held to be guilty of contributory negligence. In its opinion the court on page 643 of 120 Cal.App., 8 P.2d 226, states, "the total absence of care on the part of the minor is so apparent that the jury's finding of contributory negligence on his part is alone sufficient to support the verdict. In this respect the case is controlled by *Dul-*

lanty v. Smith, 203 Cal. 621, 627, 265 P. 814, and Moeller v. Packard, 86 Cal.App. 459, 464, 261 P. 315."

Appellants rely upon *Scandalis v. Jenny*, 132 Cal.App. 307, 310, 22 P.2d 545, and *Soda v. Marriott*, 118 Cal.App. 635, 5 P.2d 675. In the first of these two cases the injured minor was only 3 years of age and in the second he was 4½ years of age. Evidently the same rules would not apply to an intelligent boy 12 years old as were applied to these children 3 and 4½ years old respectively. The other cases cited by appellant are equally inapplicable to the facts in this case as the two just mentioned.

As the jury in the present case impliedly found that the injured minor was guilty of contributory negligence and therefore could not recover in this action, and as there is substantial evidence in the record to sustain the verdict of the jury, the judgment based upon this verdict should not be disturbed on the ground of the insufficiency of the evidence to support it.

[8] Appellants further contend that two instructions given by the trial court upon the respondents' request were erroneous and that the giving of each of these instructions was prejudicial to the substantial rights of the appellants. In one of said instructions the jury was instructed on the doctrine of imminent peril. It is contended that there was no evidence in the case supporting this instruction. Conceding this to be so, the instruction related solely to the acts of the driver of the car and the claim of appellants that it was negligently operated. It was not in any way directed to the question of the contributory negligence of the minor appellant. The appellants were not therefore prejudiced by the giving of this instruction even if it was unsupported by the evidence.

[9] The same may be said as to the other instruction which the appellants contend was prejudicially erroneous. In this instruction the jury was told that Barbara Mallory, the driver of the car, was presumed to have exercised ordinary care and obeyed the law immediately prior to and at the time of the accident. This instruction under a state of facts similar to that disclosed by the evidence in this case has frequently been criticized by the courts of this state. *Paulsen v. McDuffie*, 4 Cal.2d 111, 119, 47 P.2d 709; *Tyson v. Burton*, 110 Cal.App. 428, 294 P. 750; *Mundy v. Marshall*, 8 Cal.2d 294, 65 P.2d 65; *Kelly v. Fretz*, 19 Cal.App.2d 356, 65 P.2d 914.

In the case of *Tuttle v. Crawford*, 8 Cal.2d 126, 63 P.2d 1128, 1131 the majority opinion holds that the giving of an instruction similar to the one here under discussion "worked no serious prejudice to the defendant, and we affirm the judgment." In the dissenting opinion in that case an opposite conclusion was reached. However, the instruction in the present case was proposed by the respondents in support of their contention that they were not guilty of negligence. It was not directed to the acts of the minor and had no bearing whatever upon the claim that he was guilty of contributory negligence. Admitting that the giving of the instruction was erroneous, it cannot be held to have been prejudicial.

In our opinion, the judgment is supported by the evidence, and the appellants were not prejudiced by the giving of the criticized instructions.

The judgment is affirmed.

We concur: LANGDON, J.; EDMONDS, J.; SHENK, J.; HOUSER, J.; NOURSE, Justice pro tem.



11 Cal.2d 5

NAIFY et al. v. PACIFIC INDEMNITY CO.
et al.

Sac. 5165.

Supreme Court of California.

Feb. 25, 1938.

I. Insurance ☞229(2)

Under automobile liability policy providing that notice of cancellation mailed to address of assured should be sufficient where buyer of automobile under conditional sales contract had no choice but to accept selection of insurer made by seller, and did not receive policy or copy of it, and was not apprised of provisions of policy, and was not notified of cancellation of policy by insurer who merely notified finance company which was to notify insured, and notice given did not comply with policy requirement of tendering unearned premiums and insured continued to make pro rata payments which were accepted by insurer after alleged cancellation, policy was not canceled

by the mailed notice which was not received by insured.

2. Insurance ⇨228

To effect cancellation of automobile liability policy under provision for cancellation by mailed notice, insurer must show strict compliance with terms of policy.

3. Insurance ⇨230

Under automobile liability policy providing that notice of cancellation mailed to address of assured should be sufficient and providing that notice should state that unearned premium would be refunded on demand, letter from finance company which held assignment of conditional sale contract for sale of automobile and to which policy was delivered, informing insured buyer that policy was canceled and that unearned premium would be applied on last payment of automobile, was not sufficient compliance with terms of policy to effect cancellation.

4. Insurance ⇨229(3)

Under automobile liability policy providing that notice of cancellation mailed to address of assured should be sufficient and that finance company to which conditional sale contract for sale of automobile was assigned and to which policy was delivered should be deemed the assured, where insured who bought automobile under conditional sales contract never saw policy or had provisions called to his attention so as to make finance company his agent, notice of insurer to finance company to recall policy for cancellation was not sufficient compliance to effect cancellation of policy.

5. Contracts ⇨10(1)

Though parties within reason are free to contract as they please and to make bargains which place one party at a disadvantage, a contract must have mutuality of obligation and an agreement which permits one party to withdraw at his pleasure is void.

6. Principal and agent ⇨8

An actual agency must rest on an agreement or consent.

7. Insurance ⇨229(3)

Under automobile liability policy providing that notice of cancellation mailed to address of assured should be sufficient and that finance company which held assignment of conditional sale contract for sale of automobile and to which policy was delivered should be deemed the assured, where insured conditional buyer of automobile did

not see policy or have provision called to his attention, no agency existed which would permit finance company to cancel policy.

8. Insurance ⇨230

Under automobile liability policy providing that notice of cancellation mailed to address of assured should be sufficient and that notice should state that unearned premiums will be refunded on demand, letter stating "kindly recall policy for cancellation" to finance company which held conditional sale contract for sale of automobile and to which policy was delivered, even if finance company was considered agent of insured who was buyer of automobile, was not sufficient as letter of cancellation, since no actual notice was given insured, and no tender of unearned premium payments was made.

9. Insurance ⇨230

Under automobile liability policy providing that notice of cancellation mailed to address of assured should be sufficient and containing requirements as to tender of unearned premium payments, finance company which held assignment of conditional sale contract for sale of automobile and to which policy was delivered could not waive insured's rights to notice under the policy and continue to collect premiums for insurance.

10. Insurance ⇨104

In action against insurer, finance company holding policy and assignment of conditional sale contract for sale of automobile, and seller of automobile, to determine liability under automobile liability policy which was found not to be canceled though trial court found that defendants acted in concert to deprive insured of coverage, finance company could not be held liable, since policy was not terminated.

11. Costs ⇨101

In action by injured party and insured to recover on a policy of liability insurance against insurer, finance company holding policy and assignment of conditional sales contract and the conditional seller of the automobile, defendants were liable for costs, notwithstanding plaintiffs prevailed only as against insurer, where all defendants were properly joined and all denied and contested right to recover.

In Bank.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action upon an automobile liability policy by Fred Naify and another against the Pacific Indemnity Company, a corporation, and others. Judgment for the plaintiffs, and defendants appeal.

Affirmed as to the named defendant and reversed as to the other defendants.

Prior opinion, 68 P.2d 293.

Jerome D. Peters, of Chico, for appellants.

J. Oscar Goldstein, P. M. Barceloux, and J. M. McPherson, all of Chico, for respondents.

Bronson, Bronson & Slaven, of San Francisco, Frank V. Campbell, of San Jose, T. L. Chamberlain, of Auburn, Conley, Conley & Conley, of Fresno, Nathan F. Coombs, of Napa, Crosby & Crosby, of Oakland, Gerald M. Desmond, of Sacramento, Geary & Geary and C. J. Tauzer, all of Santa Rosa, Griffin & Boone, of Modesto, Hadsell, Sweet, Ingalls & Lamb, of San Francisco, Hoey, Hamilton & Turner, of Concord, Keyes & Erskine, of San Francisco, Hugh K. Landram, of Merced, Mannon & Brazier, of Ukiah, Neumiller & Ditz, of Stockton, O'Connor, Fitzgerald & Moran, and Redman, Alexander & Bacon, all of San Francisco, Andrew R. Schottky, of Merced, and Wyckoff, Gardner & Parker, of Watsonville, amici curiæ.

LANGDON, Justice.

This is an action by the injured party and the insured to recover on a policy of automobile liability insurance. Upon a trial by the court, plaintiffs had judgment and defendants appealed.

On October 15, 1932, plaintiff Naify contracted to purchase an automobile from defendant Pacific Nash Motor Company. A conditional sale contract was executed with the understanding that the same was to be financed by and assigned to defendant Pacific Finance Corporation, and that said defendant would procure a policy of insurance with defendant Pacific Indemnity Company, covering the respective interests of the seller and buyer. The payments called for by the conditional sale contract were \$118.75 per month for 12 months, and this sum included pro rata payments on the insurance premium, which was thereby included in the total purchase price of the car. Upon the execution of the conditional sale contract on said date of October 15, 1932, the motor company obtained the insur-

ance policy from the indemnity company, covering fire, theft, collision, property damage, and personal liability. The motor company, seller, assigned the conditional sale contract to the finance corporation, and delivered the insurance policy to said assignee.

It is to be noted that the transaction was one in which Naify, the buyer, had no choice of insurance carriers, but was, under the agreement, obligated to pay the premium for insurance procured by the finance corporation in a company of its own selection. It further appears that no copy of the policy was delivered to Naify, and he was given no information as to the terms thereof.

On July 18, 1933, the assured's brother, driving the car with the assured's consent, collided with a car driven by plaintiff Clark. Clark filed suit for damages. Naify gave due notice to the indemnity company of the accident and requested that the company undertake his defense. The indemnity company refused, stating that the policy coverage for public liability, property damage, and collision had been canceled on December 17, 1932, over six months previously. Clark secured judgment against Naify. The latter paid \$300 on account, and thereupon both plaintiffs brought this action, Naify seeking reimbursement, and Clark demanding the balance due on the judgment by virtue of the statutory liability of an insurance company to an injured party after judgment.

The facts set forth by the defendants in opposition to this claim are as follows: On December 17, 1932, about two months after issuance of the policy, an officer of the indemnity company delivered a note to the manager of the insurance department of the finance corporation, stating that it had heard reports indicating that Naify was not a desirable risk, and requesting that the finance corporation recall the policy for cancellation. The finance corporation thereupon, according to the testimony on its behalf, mailed a letter to Naify stating that pursuant to instructions and in conformity with the policy it was canceling his coverages, effective December, 1932; and that as legal owner of the car, it had instructed the indemnity company to remit the unearned premium not to Naify but to itself, which it would credit against the balance due on the contract. The letter was sent to the address given the insurance company by Naify's agent and stated in the policy; but

it was not his true address and the letter was never received by Naify. He had no knowledge of the cancellation until the answer to his notification of the collision and request to defend, in July, 1933.

The policy provided that it was subject to cancellation at any time by the insurance company on five days' written notice; and it also contained the following provisions upon which defendants chiefly rely: "Notice of cancellation mailed to the address of the Assured stated in this policy shall be a sufficient notice. Where the term Assured is used in this paragraph it shall mean the Pacific Finance Corporation of California only during the time the Pacific Finance Corporation of California has any financial interest in the automobile insured hereunder. If the Pacific Finance Corporation of California has no financial interest, then the term Assured shall mean the purchaser." Another provision in this same paragraph, upon which plaintiffs rely, reads: "Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand."

Before proceeding to a discussion of the legal issues, it may be well to review briefly just what was done by the parties. Plaintiff Naify, an automobile buyer, signed a contract agreeing to pay for the car and for insurance coverage, in installments. He performed both obligations fully. The finance corporation, as assignee of the seller, collected the installments, including that part allocated to the insurance premium; and the indemnity company, insurance carrier, received its premium for the insurance coverage. Without the knowledge of the buyer, the insurance was purportedly canceled, and for over six months plaintiff Naify was left without protection for which he nevertheless continued to pay, and the payments were received and kept by one of the defendants. Meanwhile, though collecting the full premium and canceling all plaintiff's protection, the finance corporation was permitted by the insurance company to retain all coverage protecting itself, namely, fire and theft insurance.

Plaintiffs pleaded several causes of action, and the court found in their favor against all defendants. The theory of the judgment is that the three defendants acted in concert; that the conditional sale contract, the assignment, and the insurance policy were all included within a single transaction; that the notice of cancellation was ineffective; and that the defendants

had agreed to insure Naify but left him unprotected. We are in full accord with the court's conclusion that plaintiffs should recover, and there are sound reasons for recovery against each of the defendants according to different inferences which may be drawn from the facts. But defendants argue that the judgment, as rendered, is inconsistent, in that it declares the insurance company liable on the policy, yet holds the other defendants liable for failure to keep the plaintiff insured. It is, of course, true that Naify could not be both insured and uninsured at the same time, and accordingly it is necessary to determine whether he was or was not, or, in other words, whether his policy was effectively canceled prior to the accident.

[1] At the outset we are met with a question raised by *amici curiæ* on behalf of various insurance companies, namely, whether a notice of cancellation, sent to the address of the assured as stated in the policy, and pursuant to a provision in the policy stating that the mailing thereof shall be sufficient notice, is effective despite lack of receipt by the insured. In this simple form, the question may perhaps be answered in the affirmative (see *Raiken v. Commercial Casualty Ins. Co.*, N.J.Sup., 135 A. 479), though it has not yet been directly ruled upon in this jurisdiction. See *American Building Maintenance Co. v. Indemnity Ins. Co.*, 214 Cal. 608, 7 P.2d 305. But the special circumstances of this case make such a doctrine entirely inapplicable. Ordinarily, the insured chooses his company and his policy; here the insured had no choice but to accept the selection of the seller. Ordinarily, the insured receives his policy and is for this reason presumed to have read it; here the insured did not receive either the policy or a copy of it; and none of the provisions relied upon here was brought to his attention. Ordinarily, when the insurance company cancels a policy, it gives notice, by whatever method is chosen, to the insured; here the insurance company did not notify the insured buyer, but merely the insured seller, and it was the latter who is supposed to have notified the plaintiff. Ordinarily, the notice given complies with the policy requirement of tendering the unearned premium; here the notice did not do so. Finally, the normal effect of repudiation of a contract and refusal to perform on one side is the excuse of performance on the other side; here the insurance company purported to terminate its obligations to the insured, but performance by the in-

sured continued, and the pro rata payments on the premium were still accepted. In the light of these facts, can it be said that the policy was canceled by a mailed notice not received by the insured? We think not.

[2,3] But if we assume the applicability of the provision for mailed notice, defendants must show a strict compliance with its terms in order to effect a cancellation. *B. & B. Trucking, Inc. v. Home Fire & Marine Ins. Co. of California*, 125 Misc. 312, 209 N.Y.S. 511, affirmed 216 App.Div. 710, 214 N.Y.S. 812, Id., 243 N. Y. 558, 154 N.E. 604; *Levan v. Pottstown, etc., Ry. Co.*, 279 Pa. 381, 124 A. 89; *Fox v. Connecticut Fire Ins. Co.*, Mo.App., 268 S.W. 393; *Nederland Life Ins. Co. v. Meinert*, 7 Cir., 127 F. 651. They have not done so, for neither of the two notices relied upon was sufficient. The first, the letter mailed by the finance corporation to plaintiff Naify, was fatally defective. The policy provides that notice shall state that the excess premium will be refunded on demand. The letter contained no such statement. Instead, the finance corporation, seeking to improve its position as holder of the conditional sale contract, stated, " * * * We have instructed the Pacific Indemnity Company to remit the unearned premium to us and when it is received, we will credit it against the balance due on your contract. * * *" In other words, it baldly informed the insured that although the insurance company was remitting the unearned premium, it (the finance corporation) was appropriating the sum to its own use for a period of some six months, following which it would give the insured credit for the same on another obligation, the last payment due on the car. To the extent that it collected pro rata premium payments and diverted them to other uses the finance corporation was guilty of conversion, and still more obviously of a breach of the plain provisions of the policy. Hence, in so far as the insurance company seeks to establish cancellation through the agency of the finance corporation, by means of the letter sent to Naify, its position is untenable.

[4-7] The second theory advanced is that cancellation was effected by the prior letter of the insurance company to the finance corporation, which states: "Kindly recall policy for cancellation." Defendants point to the provision of the policy that the finance corporation shall be deemed the assured while it has any interest in the au-

tomobile, and assert that it was proper to terminate Naify's policy by notice to the finance corporation alone. Were the validity of this provision squarely presented, we would have serious doubts thereon. Parties are, within reason, free to contract as they please, and to make bargains which place one party at a disadvantage; but a contract must have mutuality of obligation, and an agreement which permits one party to withdraw at his pleasure is void. *Shor-tell v. Evans-Ferguson Corp.*, 98 Cal.App. 650, 277 P. 519; *Williston, Contracts*, 2d Ed., § 104. By analogy, it seems questionable whether a contract can validly provide that A is bound thereunder unless B decides to withdraw, and that B's notice of withdrawal may be given to X, a third party who is not A's agent, and who in fact occupies two positions antagonistic to A; a creditor of A, and an agent of the adverse party. The only basis upon which such withdrawal could be justified would be that X was authorized by A to act as his agent to cancel the contract; that is, that the finance corporation was authorized by Naify to act as his agent in canceling the policy. It is elementary that actual agency must rest on agreement or consent. *Restatement, Agency*, § 15. What if the policy made such a provision, a point not free from doubt? Naify never saw the policy, his attention was never called to the provision, and therefore it cannot be said that he agreed to such an agency. See *Los Angeles Inv. Co. v. Home Sav. Bank*, 180 Cal. 601, 182 P. 293, 5 A.L.R. 1193. Does the conditional sale contract, which Naify signed, so provide? Clearly it does not; it states only that the finance corporation may procure insurance, but it gives no inkling of a proposed extraordinary agency in the finance corporation to cancel Naify's insurance. It is impossible, therefore, to find any factual or legal basis for the asserted right of the insurance company to cancel by giving notice to the finance corporation.

[8,9] We may, however, assume for the moment that the provision authorizing notice to the finance corporation alone was binding on Naify despite his total lack of assent thereto. Still defendants cannot prevail, for this notice, like the other, failed to comply with the provisions of the policy. In the first place, the letter to the finance corporation was not a notice of cancellation, but a request that the corporation recall the policy for cancellation. The finance corporation was thereby made agent

of the insurance company to procure the policy, and neither in terms nor in effect was this letter a notice of cancellation. Indeed, it is shown in the record that the purported assured here, the finance corporation, did not suffer any cancellation of its coverages, and that the whole purpose of the letter was to have the finance corporation give actual notice of cancellation of the coverages of Naify. In the second place, even if the letter might be construed as an actual notice of cancellation, it was, like the letter to Naify, utterly lacking in a statement that the unearned premium would be repaid on demand. It is suggested by defendants that this requirement could be waived by the finance corporation, but inasmuch as the letter is relied upon to effect a cancellation of Naify's coverages, only he could waive compliance with the requirement. If this were not true, then the insurance company could cancel at will, without five days' notice, or without any notice, and its so-called "assured," the finance corporation, having fully protected itself, could "waive" all the policy requirements as to Naify. We find nothing either in the policy or the conditional sale contract which gives any such extraordinary authority to the finance corporation. The contract merely authorizes the seller to keep the property insured in a company or companies selected by it, and obligates the buyer to pay the premiums. It is impossible to construe it as an authorization of the seller or its assignee to collect the premiums and contemporaneously to "waive" all of the buyer's rights under the policy.

[10] We conclude, therefore, that the insurance policy was in full force and effect at the time of the accident, and that plaintiffs were entitled to recover under its terms. This being so, it would appear that the defendant finance corporation cannot be held liable on the theory that it failed to keep plaintiff Naify insured. It may be true, as indicated by the trial court, that all of the defendants acted in concert in an attempt to deprive Naify of his insurance coverage, but since, under our holding, the attempt was unsuccessful, plaintiff suffered no appreciable damage therefrom. In short, defendant finance corporation would undoubtedly have been liable in the full amount of the loss sustained by Naify, if the policy had actually terminated while it continued to collect premium payments therefor, but the conclusion that the policy was not terminated is inconsistent with such liability.

[11] All defendants were, however, properly joined in the action in an attempt to discover which was liable for plaintiff's claims; and since all denied and contested plaintiffs' rights of recovery under the policy, none should recover costs.

The judgment against defendant Pacific Indemnity Company is affirmed, with costs to respondent. The judgments against defendants Pacific Nash Motor Company and Pacific Finance Corporation are reversed, neither party to recover costs.

We concur: WASTE, C. J.; CURTIS, J.; HOUSER, J.; SHENK, J.; SEAWELL, J.



10 Cal.2d 771

SCHNEIDER v. TURNER et al.

Sac. 5037.

Supreme Court of California.

Feb. 25, 1938.

1. Mortgages ⇨463

In an action to foreclose a deed of trust securing a note, and amounts borrowed by the mortgagor after the date of the note, a balance due plaintiff was not shown to represent unsecured indebtedness existing prior to the execution of the deed of trust by the fact that a summary of the account introduced in evidence included such pre-existing indebtedness where credits to defendant subsequent to the date of the deed of trust would discharge such indebtedness in full if applied thereto.

2. Mortgages ⇨578

In an action to foreclose a deed of trust securing a note and amounts borrowed by defendant subsequent to its date, it may be presumed in support of the judgment that credits to defendant after the execution of the deed of trust have been applied in payment of items not secured by the deed of trust and that the balance due represents the advances which were secured thereby.

3. Usury ⇨49

Interest may not be compounded except pursuant to the agreement of the parties. St.1919, p. lxxxiii, § 2.

4. Guaranty 100

Where one working on defendant's prune ranch threatened to stop work unless plaintiff, who had contracted to buy the prunes, would guarantee payment, and plaintiff did guarantee payment and subsequently paid a judgment recovered against him and defendant for the labor performed by such person, he was entitled to charge defendant with the amount of the payment in the settlement of the accounts between them.

In Bank.

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Action by F. A. Schneider, transacting business as the Warren Dried Fruit Company, against H. B. Turner and another to foreclose a deed of trust and chattel mortgage. From a judgment for plaintiff, defendants appeal.

Affirmed.

Huston, Huston & Huston, of Woodland, for appellants.

Rich, Weis & Carlin, of Marysville, for respondent.

PER CURIAM.

This is an action to foreclose a deed of trust and a chattel mortgage executed by defendants H. B. Turner and Alice M. Turner, his mother, to secure a promissory note in the principal sum of \$1,250, payable to plaintiff. The court below found that, in addition to the principal sum of \$1,250, there was due on said note interest from date of execution in the sum of \$275.74. It further found that said deed of trust and chattel mortgage also secured an unpaid balance of account in the amount of \$232.58 due from defendant H. B. Turner to plaintiff, and attorney's fees in the amount of \$150. Defendants appeal from said judgment. They contend that said balance of account, or a portion thereof, is not secured by the deed of trust.

The chattel mortgage by its terms was security for all existing and future indebtedness owing from the mortgagors to the mortgagee, as well as for the promissory note. The deed of trust, however, was security for the promissory note and for "all amounts of principal hereafter borrowed by said grantors from said beneficiary to the limit aforesaid [\$6,000] and interest thereon."

Defendant H. B. Turner is a grower of prunes. Plaintiff, F. A. Schneider, con-

ducts a business for the marketing of dried fruit under the name of Warren Dried Fruit Company. Plaintiff and Turner commenced to do business in 1930, when Turner contracted to dispose of his 1930 crop through plaintiff. Due to the prevailing economic depression, a large part of the 1930 crop was not readily marketable. In this situation plaintiff made cash advances or loans to Turner against his prunes delivered to plaintiff, in advance of the sale of the prunes by plaintiff. In most instances a promissory note was given for cash advances made. On April 13, 1932, when the note for \$1,250 was executed, Turner was indebted to plaintiff in a large sum on account of cash advances and charges made against him on account of the undisposed portion of his crops. The note for \$1,250 and deed of trust and chattel mortgage were executed for a further cash advance of \$1,250 then made by plaintiff to Turner. The deed of trust covers an acre of land in Yuba county, while the chattel mortgage applies to fruit dehydrating equipment on said land. The mother joined in the deed of trust and mortgage by reason of her interest in the property subject thereto.

Thereafter plaintiff made further cash advances to Turner and additional charges against him in connection with his prunes delivered to plaintiff. Turner's 1931 and 1932 crops were also delivered to plaintiff.

The instant action for foreclosure was filed in May, 1934. Upon the trial plaintiff introduced an instrument described as "a summary of the H. B. Turner account," which had been prepared by plaintiff's bookkeeper from plaintiff's books of account. Said paper lists chronologically all charges against Turner from the time he commenced to deal with plaintiff in November, 1930, including the note for \$1,250 and other cash advances, and charges on account of the fruit.

Following this list of charges against Turner is a list of credits in his favor, representing sales proceeds of his fruit marketed by plaintiff. The amount by which the charges exceed the credits represents the balance of indebtedness due from Turner, including principal and interest on the note of \$1,250. Deducting the unpaid principal of the note in the sum of \$1,250, and interest of \$275.74 thereon, from the total indebtedness, the court found that a balance of \$232.58 was due from Turner, in addition to the amount of principal and interest due on said note.

The court found that this sum of \$232.58, as well as the unpaid principal and interest on the note, was secured by the deed of trust and chattel mortgage.

[1] We have heretofore stated that the deed of trust by its terms secured amounts thereafter borrowed by Turner in addition to the note for \$1,250. It was not also security for pre-existing indebtedness as was the chattel mortgage. In computing the total of charges against Turner in accordance with the above-described summary of account, the plaintiff included charges made against Turner before the execution of said deed of trust. The result, defendants contend, is that the figure of \$232.58, held by the trial court to be secured by the deed of trust, includes a sum not secured thereby.

It does not appear from the summary of account, nor the testimony, that any portion of said figure comprises indebtedness which is unsecured because it represents a balance of indebtedness existing before execution of the deed of trust. The sales proceeds realized by plaintiff from Turner's prunes subsequent to execution of the deed of trust exceed by several thousand dollars the amount of his indebtedness at the time of execution of the deed of trust. Application of these sales proceeds to the earlier indebtedness not secured by the deed of trust would discharge said indebtedness in full, with the result that the balance of \$232.58 would represent later advances which the deed of trust secures. *Bank of America Nat. Trust & Savings Ass'n v. Kelsey*, 6 Cal.App.2d 346, 44 P.2d 617.

If defendants were of the view that the figure of \$232.58 included amounts unsecured by the deed of trust, they had an opportunity during the trial of the case to elicit further facts. This they did not do.

[2] Defendants further contend that a number of items included in the list of charges against Turner arising subsequent to the execution of the deed of trust are not secured by the deed of trust, for the reason that they cannot be construed as "amounts borrowed" within the meaning of the deed of trust. The balance of account is the small sum of \$232.58 (exclu-

sive of the note of \$1,250 and interest). Here again it may be presumed in support of the judgment that credits arising after the execution of the deed of trust have been applied in payment of any items which may not have been secured by said deed of trust and that the sum of \$232.58 represents cash advances made after execution of the deed of trust, which were clearly secured thereby.

[3] Defendants also contend that the several items of interest included in the list of charges consist in part of compound interest on charges which did not bear such interest. Interest may not be compounded except pursuant to the agreement of the parties. *St.1919, p. lxxxiii, § 2*; *Yndart v. Den*, 116 Cal. 533, 48 P. 618, 58 Am.St. Rep. 200; 14 Cal.Jur. 687. It does not appear from the summary of account herein that it includes any unauthorized compound interest. Certain of the charges admittedly bore compound interest by virtue of the agreement of the parties. Defendants in the trial court did not challenge the correctness of the items of interest listed on the ground that they consisted in part of unauthorized compound interest, nor did they request a more detailed statement as to the interest computation.

[4] It is further contended that an item of \$801.11 has been charged against Turner improperly. One Isaacson secured a judgment against Turner and plaintiff on account of labor performed by him on Turner's prune ranch. Plaintiff paid the amount of the judgment against it, with interest and costs, amounting in all to \$801.11. Isaacson had threatened to stop work on Turner's land unless plaintiff would guarantee his payment. Plaintiff had contracted to buy Turner's prunes and also had made large cash advances to him. In this situation it guaranteed payment to Isaacson, and by reason thereof was liable to Isaacson. But, as between plaintiff and Turner, the charge for Isaacson's labor should properly be borne entirely by Turner, on whose ranch the labor was performed. In settlement of the balance of accounts between them plaintiff was entitled to charge Turner for the amount of this payment.

The judgment is affirmed.

10 Cal.2d 636

**STOCKBURGER, Director of Department
of Finance, v. JORDAN, Secretary of
State.**

SAME v. RILEY, Controller.

L. A. 16472, 16473.

Supreme Court of California.

Feb. 14, 1938.

1. Constitutional law ⇨70(1)

The determination of existence of public necessity for enactment of an urgency measure rests upon judgment of Legislature, and courts will not interfere with Legislature's determination unless it appears clearly and affirmatively from Legislature's statement of facts that a public necessity does not exist.

2. Constitutional law ⇨70(1)

Where Legislature, in passing act relating to removal of hydrocarbon substances from state lands, declared that it was deemed necessary for immediate preservation of public peace, health, and safety that measure take effect immediately, court, in determining whether act was subject to constitutional provision authorizing referendum petition, was precluded from questioning necessity for that legislation. St.1937, p. 665; Const. art. 4, § 1.

3. Statutes ⇨161(2)

Where one of two acts enacted on same day amending same statute went into effect 90 days after adjournment of Legislature, but a referendum petition was filed against the other, the second was ineffective until approved by electors of state, and upon such approval it took precedence over first amendatory act which had become effective on a prior date. Pol.Code, § 675, as amended by St.1931, pp. 845, 851; Const. art. 4, § 1.

4. Statutes ⇨167(1)

Where statute is revised and some parts omitted, and it is clearly intention to cover the whole subject by statute, omitted parts are considered as repealed or annulled.

5. Mines and minerals ⇨5
Statutes ⇨164

Where one amendatory act amending statute relating to duties of state director of finance gave director authority to lease state lands for production of hydrocarbons, but another amendatory act subsequently becoming effective omitted that authorization, and both amendatory acts purported to cover whole subject of duties of director

of finance respecting leasing of state lands, the last amendment to become effective was controlling and director of finance was thereafter without authority to lease lands for hydrocarbons. Pol.Code, § 657, and § 675, as amended by St.1931, pp. 845, 851.

6. Statutes ⇨35½

Where state director of finance had previously had no duty in connection with leasing of state lands for production of hydrocarbons, statute giving him extensive powers and duties in that matter "changed" his duties within constitutional provision stating that no measure changing duties of any officer should be construed to be an urgency measure, and statute making such change was therefore subject to referendum provision of constitution. Pol.Code, §§ 655, 657, and § 675, as amended, and § 690, as added by St.1929, p. 892; St.1921, p. 408, § 8, as amended by St.1929, p. 11; St.1929, p. 945, § 24; St.1937, p. 665; Const. art. 4, § 1.

[Ed. Note.—For other definitions of "Change," see Words & Phrases.]

7. Statutes ⇨35½

The word "changing," as used in constitutional provision declaring that no measure changing the salary, term, or duties of any officer should be construed as an urgency measure, meant any increase or addition to duties of officer. Const. art. 4, § 1.

The verb "to change" means to alter; to make different.

[Ed. Note.—For other definitions of "Changing," see Words & Phrases.]

8. Statutes ⇨35½

That Legislature had enacted many other statutes changing duties of an officer and had purported to make them emergency measures did not alter meaning of constitutional provision declaring that no measure changing the salary, term, or duties of any officer should be construed as an urgency measure so as to be exempt from referendum. Const. art. 4, § 1.

9. Statutes ⇨35½

A statute declared by Legislature to be an urgency measure, although it actually is not, does not become effective immediately and remain effective prior to its rejection by voters in referendum, but, upon filing of referendum, statute is ineffective until there is a favorable vote thereon and a declaration of vote by secretary of state. Const. art. 4, § 1.

10. Constitutional law 70(3)

In construing constitutional provision, court was not concerned with reasons therefor, but its duty began and ended with interpretation of language used therein and with ascertaining meaning thereof.

11. Constitutional law 47

In determining whether statute authorizing state director of finance to secure development and removal of hydrocarbon substances from state lands was an urgency measure not subject to referendum provision of Constitution, court could not consider result of its decision upon rights of those concerned in litigation before it, or upon interest of state, notwithstanding that delay in development of state lands might result in loss to it. St.1937, p. 665; Const. art. 4, § 1.

In Bank.

Proceedings by Arlin E. Stockburger, as Director of the Department of Finance of the State of California, against Frank C. Jordan, as Secretary of State of the State of California, for a writ of mandate directing the Secretary of State to refrain from submitting a purported measure to a vote of the people of the state, and against Harry B. Riley, as Controller of the State of California, for a writ of mandate commanding the State Controller to audit and approve a claim and to issue his warrant for the amount thereof upon the State Treasurer.

Petitions denied.

Webb Shadle, of Sacramento, and Norris J. Burke, of San Francisco, for petitioner.

Olson & Olson, Culbert L. Olson, Newby & Newby, and Nathan Newby, all of Los Angeles, amici curiae.

U. S. Webb, Atty. Gen., and Darwin Bryan, Deputy Atty. Gen., for respondents.

CURTIS, Justice.

These two causes were argued and submitted together. As they involve the identical legal question, they will be considered and decided in one opinion. The legal question therein presented is whether chapter 304 of the Statutes of 1937, Stats.1937, p. 665, is an urgency measure and, therefore, not subject to referendum petition under the terms of section 1, article 4, of the Constitution.

The title to this act is as follows: "An act relating to certain State lands and the production and disposition of oil, gas and

other hydrocarbon substances therefrom, providing for the condemnation of real property, rights of way, easements and other interests therein for the purposes of this act, repealing all acts or parts of acts inconsistent or in conflict therewith, declaring the urgency thereof, and providing that this act shall take effect immediately."

As indicated by its title, the act relates to certain lands owned by the state which are capable of producing oil, gas, and other hydrocarbon substances. In section 1 of the act, St.1937, p. 666, these lands are referred to more definitely as "certain tide and submerged lands at Huntington Beach, Orange County," and are described by metes and bounds. By section 2 of the act, it is recited that the oil and gas deposits in said lands are being constantly drained by oil wells drilled in, and operating on, private property situated adjacent thereto, and that the protection of the public interest requires the development of said lands and the production and removal of the oil, gas, and other hydrocarbon substances therefrom for the benefit of the state. Section 3 provides that: "The Director of Finance is hereby authorized and directed to secure the development, extraction, removal and sale of oil, gas and other hydrocarbon substances from said lands for the benefit of the State in the manner hereinafter provided." Section 5 of the act gives to the director of finance the power and authority to acquire by condemnation, or otherwise, any real property and any right of way necessary or desirable for the convenient access to said state lands for the purpose of development of the same. Sections 6 to 25, inclusive, of the act, St.1937, pp. 667-675, provide for the leasing of said land and lay down a procedure to be followed in the leasing of said land by the director of finance and those desiring to make leases thereof. All persons desiring to lease any parts of said land may file bids for such leases, and, in the event no bids are received, the director of finance may again call for bids, or, with the consent and approval of the Governor of the state, may immediately proceed to drill wells on said lands for and on behalf of the state, and to that end may purchase all necessary equipment for the prosecution of said work. The work of drilling and construction work connected therewith, if done by the state, may be performed under contract let to the lowest bidder. All gas, oil, or other hydrocarbon substances from said wells belonging to the state shall be sold by the director of finance.

Section 27, St.1937, p. 676, provides for the repeal of all acts inconsistent or contrary to the enacted statute. By section 28 of the act it is declared that it is deemed necessary for the immediate preservation of public peace, health, and safety, and that said measure "shall take effect immediately," and a statement of facts constituting such necessity is set forth in said section of said act.

In the proceeding against the secretary of state, being L. A. No. 16472, the petitioner alleges the passage and approval of chapter 304 of the Statutes of 1937; that the director of finance has advertised for bids for leasing said lands; that bids have been received by him for leases thereof, and that a time has been fixed for the opening of said bids; that respondent secretary of state has received from the registrars and county clerks of the several counties of the state copies of a purported petition to submit to a vote of the people at the next general election in the state under the referendum provision of the Constitution, said measure designated as chapter No. 304 of the Statutes of the Legislature of 1937; that said respondent has issued his certificate that said referendum petition has qualified as a measure to be submitted to a vote of the people; and that said respondent will, unless otherwise ordered by the court, submit said proposed referendum measure to the electors of the state at the next general election in the state of California. Petitioner asks for a writ of mandate directed to the respondent secretary of state commanding him not to submit said purported measure to a vote of the people of the state.

In the proceeding against the state controller, L. A. No. 16473, petitioner alleges that said chapter 304 was enacted by the 1937 Legislature; that in the performance of his duties under said statute he, as director of finance, has purchased certain supplies required by the terms of said statute for which he has filed with said respondent controller a claim against the state of California, and that said controller has refused to audit or allow said claim or any part thereof, and has refused to issue his warrant upon the state treasurer in payment of said claim. In this proceeding, petitioner seeks a writ of mandate commanding the respondent state controller to audit and approve said claim and to issue his warrant for the amount thereof upon the state treasurer.

A general demurrer was interposed to the petition in each of said proceedings, and

the two causes have been submitted for decision upon briefs filed by the respective parties. In their briefs, the two respondents contend that chapter 304 of the Statutes of 1937 is subject to the referendum provision of the Constitution of this state, section 1, art. 4, that an adequate and legal petition has been duly filed requiring said act to be submitted to the vote of the people of this state at the next general election for rejection or approval, and that said act does not go into effect until approved by a majority of the electors of the state voting thereon. Petitioner does not question the sufficiency of the said referendum petition, but contends that chapter 304 is not subject to the section of the Constitution providing for the filing of referendum petitions against acts of the Legislature, and that chapter 304 became effective at the date of its enactment, as expressly provided therein.

Those portions of article 4, section 1, of the Constitution, relative to the issues herein, are as follows: "The second power reserved to the people shall be known as the referendum. No act passed by the Legislature shall go into effect until ninety days after the final adjournment of the session of the Legislature which passed such act, except acts calling elections, acts providing for tax levies or appropriations for the usual current expenses of the State, and urgency measures necessary for the immediate preservation of the public peace, health or safety, passed by a two-thirds vote of all the members elected to each House. Whenever it is deemed necessary for the immediate preservation of the public peace, health or safety that a law shall go into immediate effect, a statement of the facts constituting such necessity shall be set forth in one section of the act, which section shall be passed only upon a yea and nay vote, upon a separate roll call thereon; provided, however, that no measure creating or abolishing any office or changing the salary, term or duties of any officer, or granting any franchise or special privilege, or creating any vested right or interest, shall be construed to be an urgency measure. Any law so passed by the Legislature and declared to be an urgency measure shall go into immediate effect."

[1,2] It is well settled in this state, and in most other jurisdictions where the question has been the subject of judicial consideration, that the determination of the existence of a public necessity for the enactment of an urgency measure rests upon

the judgment of the Legislature. It is said to be purely a legislative question, the determination of which will not be interfered with by the courts, save in those few exceptional cases where it appears clearly and affirmatively from the Legislature's statement of facts that a public necessity does not exist. *Hollister v. Kingsbury*, 129 Cal. App. 420, 18 P.2d 1006; *In re McDermott*, 180 Cal. 783, 183 P. 437; *Roy v. Beveridge*, 125 Or. 92, 266 P. 230; *Arkansas Tax Comm. v. Moore*, 103 Ark. 48, 145 S.W. 199; *State v. Carter*, 257 Mo. 52, 165 S.W. 773. The Legislature having determined by the declaration contained in said act that the enactment of said statute was necessary for the immediate preservation of the public peace, health, and safety, and the determination of the Legislature of the existence of such necessity being conclusive upon the courts, we are precluded in these proceedings from further questioning the necessity for such legislation. All parties to these proceedings are in agreement as to this proposition.

While the Legislature is given the power to declare when the necessity exists for the enactment of an urgency measure, it is expressly provided in said section of the Constitution that: "No measure creating or abolishing any office or changing the salary, term or duties of any officer * * * shall be construed to be an urgency measure." Respondents contend that chapter 304 changes the duties of the director of finance, and therefore under the referendum provision of the Constitution said statute "shall [not] be construed as an urgency measure." Petitioner, in answer to this contention, argues that the statute does not change the duties of the director of finance or of any other officer of the state. As the duties of no other officer of the state are affected by this statute, except those of the director of finance, it will only be necessary to consider said act in so far as it affects the duties of such officer.

As indicated by the brief references to the various sections of said statute, the director of finance is given quite extensive powers by the terms of said act. Not only is he made the agent and representative of the state in the leasing of said oil-producing lands and as such given direct charge of all leases under the act, but, in case no bids are received for the leasing of said lands, the director of finance, with the consent and approval of the Governor, may proceed immediately with the drilling of wells thereon for and on behalf of the state for the

production, removal, and disposal of oil, gas and other hydrocarbon substances therefrom. This drilling of said lands may be done under contract, or it may be carried on directly by the state. In either of such events, the director of finance represents the state in all such operations, and, furthermore, it is made his duty to sell to the highest bidder all oil, gas, or other hydrocarbon substances produced.

[3-5] In order to determine whether the duties of the director of finance have been changed by the enactment of chapter 304, it will be necessary to review the history of the legislation creating the office of director of finance and prescribing his duties. The office of director of finance was created in the year 1927. Section 655, Pol.Code; Stats.1927, c. 251, p. 449. Under this act of the Legislature, chapter 251, the various duties of this officer were defined. This act added a new article to chapter 3 of title 1 of part 3 of the Political Code, and embraced sections 654 to 685, both inclusive, of said Code. Section 657 of the Political Code, as embraced within said act, provided that the director of finance as head of the department of finance should perform all duties, exercise all powers and jurisdiction, assume and discharge all responsibilities, and carry out and effect all purposes, now or hereafter vested by law in the department of finance, except such duties, powers, jurisdiction, responsibilities, and purposes as were by said act specifically vested in the board of control. We do not find that said act vested in the board of control any duties respecting the leasing of land belonging to the state. Section 675 of the Political Code, embraced in said act, gave to the director of finance the power to lease "with the consent of the state department, board, commission, or officer concerned" real or personal property belonging to the state under certain conditions not necessary to here state. Evidently this section of the Code thus enacted gave the director of finance no authority to lease oil-bearing or other mineral lands of the state. In 1929 the office of surveyor general was abolished and the department of finance succeeded to the duties and powers of that office. Pol.Code, § 690, Stats.1929, p. 892. Section 675 of the Political Code was amended in the same year. Stats.1929, p. 894. By the amended section, the director of finance's power to lease state lands was made more specific but did not include the power to lease oil lands. In 1931 said sec-

tion 675 was amended by the enactment of two sections, each numbered 675 and published in the Statutes of 1931 as chapters 325 and 326, respectively. Stats.1931, pp. 845, 851. These amendments were enacted and approved on the same day and accordingly would have gone into effect on the same date unless a referendum petition was filed against one of them. Section 675 as amended by *chapter 325* contained ten subdivisions, the first eight of which were practically identical with those contained in section 675 as amended in 1929. The ninth subdivision referred to land of the state abutting on abandoned river channels and is not relevant to any question involved herein. The tenth subdivision of said section gave to the director of finance authority to lease "any land belonging to the state or in which the state has an interest, for the production of minerals, oil, gas or other hydrocarbons." By *chapter 326* of said Statutes, section 675 of the Political Code was amended so that it read precisely like said section as amended by chapter 325, except that subdivision 10 contained in chapter 325 was omitted from said section as amended by chapter 326. A petition under the referendum provision of the Constitution was filed asking that chapter 326 be submitted to the vote of the people. At a special election held on May 3, 1932, it received a favorable vote of the people, and accordingly went into effect five days after the date of the official declaration of said vote by the secretary of state. As the effective date of chapter 326 was long subsequent to the effective date of chapter 325 of the laws of 1931, chapter 326 must be held to be the later statute and, therefore, it repealed by implication all provisions of chapter 325 inconsistent with those of chapter 326. We find no authority directly supporting this statement, and none has been called to our attention. On the other hand, we know of no authority holding a contrary view. We think, however, that no other reasonable conclusion can be sustained. The two statutes were enacted on the same day. Chapter 325 went into effect ninety days after the adjournment of the Legislature. A referendum petition was filed against chapter 326. The Constitution, article 4, § 1, provides that, upon the filing of a referendum petition, "No such act * * * shall go into effect until and unless approved by a majority of the qualified electors voting thereon." Chapter 326 was ineffective, therefore, until approved by the electors of the

state and the official declaration of the result of said vote by the secretary of state. Five days after such declaration the act for the first time became effective. It necessarily, and by all rules of statutory construction, repealed by implication all acts inconsistent with its provision at that date. If the Legislature should enact two statutes upon the same subject-matter, the terms of one of which was different and inconsistent with the terms of the other, and one of said statutes became effective ninety days after the adjournment of the Legislature, and the other was made effective one year after said date, the first of said statutes would control said subject-matter until the effective date of the second statute, when the provisions of the second statute would supersede all provisions of the first statute inconsistent with those of the second. In effect, this is the situation respecting chapter 325 and chapter 326. The latter, under the Constitution of this state having been made effective at a date subsequent to the effective date of the former, takes precedence over the former and governs the subject-matter of such legislation. It is to be noted that the only difference in the two enactments was the omission of subdivision 10, found in chapter 325, from chapter 326. Where a statute is revised and some parts omitted, and it is clearly the intention to cover the whole subject by the statute, the omitted parts are considered as repealed or annulled. *Wood v. Roach*, 125 Cal.App. 631, 14 P.2d 170; *Mack v. Jastro*, 126 Cal. 130, 131, 133, 58 P. 372; *Carter v. Stevens*, 208 Cal. 649, 284 P. 217. Both chapter 325 and chapter 326 purport to cover the whole subject of the duties and powers of the director of finance respecting the leasing of land belonging to the state, and, when the subsequent act omitted subdivision 10, found in chapter 325, both reason and authority would indicate that it was the intention of the Legislature to withdraw from the director of finance those powers granted to him by said subdivision 10 of chapter 325.

Not only did chapter 326 repeal and supersede chapter 325, but also, being a special act fixing the duties of the director of finance, it superseded the general duties imposed upon that officer by section 657 of the Political Code which, as we have seen, was enacted in 1927, and gave to the director of finance all the powers and duties vested in the department of finance. 23 Cal.Jur. p. 708.

It might be well to make further reference to certain legislation respecting the leasing of tide and overflowed lands belonging to the state. The Mineral Land Act of 1921, section 8, Stats.1921, p. 408, gave to the surveyor general the authority to lease such lands on a royalty basis. The director of finance subsequently succeeded to these powers. But by subsequent legislation these powers were suspended and the surveyor general was deprived of all such powers and authority. Stats.1929, p. 11; also, page 945. By section 24 of this later act, the Legislature in express terms deprived every state officer of any and all power to lease any tide or submerged lands for the drilling of oil and gas. These statutes were in force up to the date of the enactment of chapter 304.

[6] That chapter 304 made a material and substantial addition to the duties of the director of finance over those existing and conferred upon him prior to the enactment of said statute cannot, we think, be successfully challenged. Prior to that date he had no duty to perform in reference to the leasing of the lands of the state for the production of oil, gas, or other hydrocarbon substances. In fact, he and all other officers of the state were prohibited from leasing any of the tide or submerged lands of the state for the drilling of oil and gas. By chapter 304 he is given extensive powers and corresponding duties not only in the leasing of the lands described in the act, but under certain conditions it is made his duty to proceed with the drilling of wells on said lands for and on behalf of the state for the production of oil and gas therefrom.

[7] The word "change" has various shades of meaning depending upon the subject-matter to which it is applied. Petitioner contends that the mere addition of duties to those already imposed upon an officer is not a change in his duties. He cites the definition of the verb "to change," as given in Webster's New International Dictionary as follows: "to alter by substituting something else for; or by giving up for something else; to put or take another or others in place of; to make substitution of, for, or among." As an illustration of this meaning, we might refer to the use of the word "change" in the well-known legal term "change of venue," which implies the substitution of another place of trial for the place of trial in which the action is pending. Other stand-

ard works are cited by petitioner giving to the word "change" the same meaning as given by Webster. Petitioner also cites authorities showing that the word "change" is frequently used as meaning "substitution," "exchange," or "to put one thing in place of another." It is in this sense petitioner contends that the word "changing" is used in the section of the Constitution in which the people of the state reserved to themselves the power to refer acts of the Legislature to a vote of the electors of the state. It is argued, therefore, that a statute which merely imposes additional duties upon an officer is not such a change in his duties as to bring the statute within the provision mentioned in said section of the Constitution.

Another meaning of the verb "to change" given by Webster is "to alter; to make different." It is in this sense that the word is used when referring to a change in the by-laws or the articles of incorporation of a corporation. As so used, unquestionably any substantial addition to either of these instruments would certainly be deemed to be a change therein, and could only be made by the mode prescribed by law. It is in this sense the respondents contend that the word "changing" is used in said section of the Constitution.

An examination of the language of said section we think shows clearly that it is in this latter sense that the word "changing" is used in said section. The pertinent part of said provision reads as follows: "No measure * * * changing the salary, term or duties of any officer * * * shall be construed to be an urgency measure." We think it will not be contended that the increase or decrease in the salary of an officer is not a change in his salary. It is equally apparent that any increase or diminution in the term of an officer is a change in his term. As the three words "salary," "term," and "duties" not only occur in the same sentence but grammatically are objects of the same participle, "changing," the same meaning must be given to the participle when applied to one of these objects as when applied to the others. It is clear, therefore, that when we look at the text in which this phrase appears, the word "changing," when considered in its connection with the words "duties of any officer," must mean any increase or addition to the duties of such officer. In our opinion, no other reasonable construction

can be given the word "changing," as used in said section of the Constitution.

[8] The fact that the Legislature has enacted many other statutes which change the duties of an officer and has purported to make such statutes emergency measures cannot, under the rule of legislative construction, avail the petitioner in these proceedings. The provision of the Constitution declaring that no measure changing the salary, term, or duties of any officer shall become an urgency measure is an express limitation upon the Legislature in such matters, and we know no rule of law which holds that the repeated violation of a statute, or constitutional provision, by an individual or body, the actions of whom the statute or constitutional provision was designed to curb or limit, would change the meaning of such a statute or place a construction thereon not in fact to be found in the statute or constitutional provision.

[9] We are also unable to agree with the contention of petitioner that a measure which the Legislature has declared to be an urgency measure, but which in fact is not, goes into effect immediately upon its enactment and remains effective for all purposes even if a referendum petition is filed against it, until it is rejected by the voters of the state. This contention is against the plain terms of the Constitution which provides that a statute against which a referendum petition is filed goes into effect upon a favorable vote thereon, five days after official declaration of said vote. Respondents, on the other hand, contend that any act passed by the Legislature, even though declared to be an urgency measure, and which is in fact such a measure, is subject to the referendum provision of the Constitution that it goes into effect immediately, but, upon an adverse vote of the people, after a referendum petition has been filed against it, ceased to be of any effect. It is not necessary for us to pass upon this contention, for we are dealing with a statute which is not an urgency measure, and which, therefore, is subject to the referendum filed against it, and, therefore, is ineffective until there is a favorable vote thereon and a declaration of such vote by the secretary of state.

[10] It is not for us to speculate as to the reason for the insertion in the Constitution of the provision which prohibits

the Legislature from enacting as an urgency measure a statute changing the salary, term, or duties of any officer. Whether the purpose of the Legislature in proposing this section of the Constitution, or of the people who voted for its adoption, was to restrain "a complaisant legislature, subservient to powerful but evil influences," from awarding "an unfaithful public servant," or from punishing "one who was inexorably faithful to his trust," as contended by petitioner, is not within our province to determine. We have nothing to do with the policy of the law as expressed in this section of the Constitution, and can neither approve nor condemn the same. Our duty begins and ends with the interpretation of the language so used in the Constitution, and with ascertaining the meaning thereof. This we have attempted to do, regardless of the reasons which may have prompted those responsible for the enactment of this provision of the Constitution.

[11] Neither can we in placing a construction upon this section of the Constitution consider the result of our decision upon the rights of those concerned in this litigation or upon the interest of the state, however vital those interests may be. The Legislature determined, and the petitioner alleges, that owners of land adjacent to those belonging to the state and described in chapter 304 are by means of wells draining valuable oil and gas deposits from the state-owned lands, and that the state for that reason is daily suffering great loss and damage by being deprived of revenues which it would receive if permitted to lease said lands or otherwise develop the same under the provisions of said act of the Legislature. We must assume that this determination of the Legislature and these allegations of the petitions are true. The delay in the development of the state lands described in the statute and in pursuance thereof may result in daily loss to the state of a considerable proportion of its revenue. These considerations can have no bearing upon the duty of the court, which is simply to declare the meaning of a provision of the Constitution, regardless of the consequences that may follow. In this connection it might be stated that the power to lease these very lands was in 1929 withdrawn from any and all state officials, and these lands lay idle for eight years before the enactment of chapter 304 of the Statutes of 1937. It may be a source of re-

gret that this condition, by reason of the limitation placed upon the power of the Legislature to enact urgency measures, must continue for a few months longer.

Respondents have attacked chapter 304 upon other grounds than that discussed above. Our conclusion that the statute is not an urgency measure renders the discussion of these other grounds unnecessary.

The alternative writ, issued in each of these proceedings, is annulled, and the petitions are, and each of them is, denied.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; EDMONDS, J.



10 Cal.2d 651

CLANCY v. STOCKBURGER, Director of
Department of Finance.

S. F. 15917.

Supreme Court of California.

Feb. 14, 1938.

Statutes $\Rightarrow$ 35½

Where statute authorizing director of finance to secure removal of hydrocarbon substances from state lands was not an urgency measure, and a referendum petition had been filed against it, statute was ineffective until it had been approved by vote of electors and the result announced by secretary of state, and director of finance was without authority to proceed thereunder until that time. St.1937, p. 665; Const. art. 4, § 1.

In Bank.

Proceeding for a writ of mandate by Edward B. Clancy against Arlin E. Stockburger, as Director of the Department of Finance of the State of California, commanding the respondent to refrain from receiving any bids and requiring him to keep sealed and unopened any bids received by him for the leasing of state lands under a certain statute.

Writ granted.

Finlayson, Bennett & Morrow, of Los Angeles, for petitioner.

Webb Shadle, of Sacramento, and Norris J. Burke, of San Francisco, for respondent.

CURTIS, Justice.

In this proceeding a writ of mandate is sought against the respondent, Arlin E. Stockburger, as director of finance, commanding him to refrain from receiving any bids, and requiring him to keep sealed and unopened any bids received by him for the leasing of certain lands of the state under the provisions of chapter 304, Statutes of 1937, p. 665, until said measure has been approved by the voters of the state under the referendum provision of section 1, article 4, of the Constitution of this state. It is alleged in the petition herein that within ninety days from the adjournment of the 1937 Legislature a referendum petition in due and legal form was signed by the required number of qualified voters of the state asking that said act of the Legislature be submitted to the electors of the state for their approval; that, within said period of time, said petition was filed in the office of the secretary of state, and said officer has issued his certificate showing that said petition for referendum had qualified as a measure to be submitted to the voters of the state; that, notwithstanding the signing and filing of said referendum petition and the issuance of said certificate by the secretary of state that the same was sufficient and had qualified as a referendum petition, the respondent has continued to act under said statute, known as chapter 304, and will open sealed bids for the leasing of said state oil lands and will proceed to execute leases for the same unless restrained by this court. To this petition, the respondent has filed a general demurrer.

The only point involved in this proceeding is whether chapter 304 is an urgency measure and therefore went into effect immediately upon its adoption, or whether it is subject to the referendum provision of the Constitution of the state. This same point was raised and considered in the two proceedings entitled *Stockburger v. Jordan*, and *Stockburger v. Riley*, Cal. Sup., 76 P.2d 671 this day decided. In these two proceedings, it was held that chapter 304, Statutes of 1937, was not an emergency measure, and, therefore, as a referendum petition, adequate in form and signed by the required number of electors of the state, had been filed against said measure, the same was ineffective until it had been approved by the vote of the electors of the state and the result of said election announced by the secretary of

state. It follows from the holding in those proceedings that the respondent herein has no authority to proceed under the provisions of chapter 304 until the approval of said measure by a vote of the people of the state and five days after the announcement of the result of said vote by the secretary of state.

Let the peremptory writ issue as prayed for.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; EDMONDS, J.



10 Cal.2d 743

**RECLAMATION DIST. NO. 1619 v.
DODGE, County Treasurer.**

S. F. 15855.

Supreme Court of California.

Feb. 24, 1938.

1. Mandamus ⇨163

Where demurrer was interposed to a petition for writ of mandamus, allegations of petition stood admitted by demurrer.

2. Drains ⇨2(3)

Where reclamation district adopted and executed plan of reclamation, and subsequently, in order to pay outstanding warrants and to maintain reclamation work, district levied assessment and directed issuance of bonds, according to law, and judgment of superior court validated bond issue, county treasurer could not refuse to sell bonds on ground that statute, which was enacted subsequent to adoption of district's plan of reclamation, required reclamation district to have plan of reclamation approved by state board of reclamation. Pol.Code, § 3446 et seq.; § 3455(a), as amended by St. 1935, p. 2291.

3. Drains ⇨25

The purpose of statute, requiring that reclamation district which is located in Sacramento or San Joaquin drainage district to obtain approval of state board of reclamation of its plan of reclamation, was to secure uniformity among various districts in promotion of reclamation. Pol.Code, § 3455 (a), as amended by St.1935, p. 2291.

In Bank.

Petition by the Reclamation District No. 1619, a public corporation, for a writ of mandamus to compel C. L. Dodge, as Treasurer of the County of Contra Costa, State of California, to publish notice of sale and to hold a sale of certain bonds issued by petitioner.

Peremptory writ issued.

Roscoe E. Jordan, of San Francisco, for petitioner.

Francis P. Healey, of Richmond, and Francis W. Collins, of Crockett, for respondent.

WASTE, Chief Justice.

Petitioner, a reclamation district situate in Contra Costa county, seeks the issuance of a writ of mandamus compelling the respondent, as treasurer of that county, to give and publish notice of sale and to hold a sale of certain bonds issued by it. Respondent has demurred generally.

The petition alleges the regularity and validity of the organization of the district in 1914-1915 in Contra Costa county and within the Sacramento and San Joaquin drainage district, and the election and qualification of a board of trustees. It then alleges that said board of trustees made and rendered their report to the board of supervisors for an original plan of reclamation work together with an estimate of the cost thereof; that thereafter three disinterested commissioners were appointed to view and assess upon the lands of the district and apportion the same according to benefits the cost of said proposed reclamation work, which was done; that the commissioners thereafter made and filed with the board of supervisors an assessment list showing the charges assessed against each tract of land in the district; that due notice was given of the time and place fixed by the board of supervisors for the hearing of objections to said assessment; that no objections were made thereto and the same was approved by the board of supervisors; that the assessment was fully paid but the board of trustees discovered and concluded that it was insufficient to provide for the reclamation of the land in the district as contemplated in the above-mentioned plan of reclamation; that the trustees thereupon presented to the board of supervisors a statement of the work to be done and its estimated cost and the board of supervisors directed the commissioners who had made

the original assessment to assess the same against the lands in the district according to the benefits to accrue therefrom; that this was accordingly done and an assessment list disclosing the same was filed with the board of supervisors; that no objections were made to said assessment at the hearing duly noticed therefor and the same has been fully paid; that the district completed all work called for in the plan of reclamation and fully paid therefor; that subsequently and on January 31, 1918, the trustees of the district reported the reclamation work finished and that in the future it would only require funds for the maintenance and repair of the same and petitioned the board of supervisors to appoint assessment commissioners; that assessment commissioners were so appointed and, pursuant to order, prepared and filed an assessment valuation list, which was thereafter duly revised and corrected; that no objections to either the original or revised assessment valuation list were made at the hearing duly noticed therefor, whereupon the board of supervisors approved the same; that thereafter and based upon said assessment valuation list, the trustees levied various assessments on the lands in the district for the purpose of raising money to defray the costs and expenses of maintaining and repairing the reclamation work; that on July 25, 1935, the trustees in meeting assembled enacted a resolution and order, pursuant to the provisions of section 3480 of the Political Code, as amended by St.1933, p. 1219, calling a special election of the landowners for the purpose of bonding the district to raise money for the purpose of paying outstanding warrants and interest thereon and to continue the maintenance and repair of the reclamation work; that at such duly noticed and specially held election a large majority of the votes cast favored the issuance of said bonds; that on January 23, 1936, the trustees levied and apportioned an assessment in the sum of \$60,000 on all the lands in the district and directed the issuance of bonds in said amount, bearing interest at the rate of 5 per cent.; that notice thereof was published as required by law; that the assessment so levied was filed, as required, in the office of the county treasurer; that on March 10, 1936, the trustees caused to be prepared and signed by the president of the district, attested by the county auditor, and delivered to the respondent county treasurer, sixty \$1,000 bonds of the district, bearing interest at 5 per cent., and serially numbered from 1 to 60; that immediately there-

after the district, petitioner herein, as plaintiff, instituted a validation proceeding in the superior court, as authorized by section 3480, supra; that no appearances were made or answers filed by or on behalf of any defendant or land or landowner, and the default of the defendants was entered therein; that on or about June 5, 1936, the superior court made and entered its amended judgment validating the bond issue, which judgment, it is declared in section 3480, supra, "shall be considered as a judgment in rem and shall be conclusive against said district and against all lands therein and all owners thereof and other interested persons"; that thereafter and on November 12, 1936, the trustees enacted a resolution requesting the respondent treasurer to publish notice of sale of the bonds and to sell the same in accordance with law; and that the respondent treasurer in writing refused so to do.

In support of his demurrer to the petition, and of his refusal to act in the manner requested, the respondent treasurer has abandoned, as being without merit, all contentions heretofore advanced by him except that having to do with the alleged failure of the petitioning district to comply with the provisions of section 3455(a) of the Political Code, as amended by St.1935, p. 2291. Briefly, the section requires, among other things, that any reclamation district, such as petitioner, located in whole or in part within the Sacramento and San Joaquin drainage district must obtain the approval of the state board of reclamation of its plan of reclamation.

[1,2] The provision of the cited section requiring such prior approval presents no obstacle to the issuance of the writ here sought. It is apparent from the allegations of the petition, which for present purposes stand admitted by demurrer, that the petitioning district was organized and its plan of reclamation adopted and carried out at a time when the section did not require such prior approval. The section was amended in 1917 to so provide. Stats.1917, p. 1198. On the other hand, a reading of the petition in the light of the pertinent sections of the Political Code (3446 et seq.), as they read at the time of the organization of the petitioning district and the adoption and carrying out of its plan of reclamation, discloses complete conformity with the applicable law on the subject. It also appears that the district long since has completed its plan of reclamation and had so notified

the board of supervisors, as required, at which time it was indicated that thereafter the district would only require funds for the maintenance and repair of said work of reclamation whereupon, pursuant to petition, assessment commissioners were appointed and an assessment valuation list adopted and approved, without objection, which list thereafter was to be employed as the basis for levying assessments for the purpose of raising money with which to defray the cost of repairing and maintaining the reclamation work. As we read the petition and the exhibits attached thereto, the moneys to be derived under the assessment of January 23, 1936, and the bonds issued pursuant thereto which it is here sought to compel the respondent to advertise and sell, are to be employed as authorized by the provision of section 3456(b), as amended by St.1935, p. 2907, reading as follows: "Thereafter [i. e., following completion of reclamation plan and adoption of assessment valuation list, as here] whenever, in the opinion of the trustees of the district, it shall be necessary to raise any sum for the construction, maintenance or repair of the works of reclamation, or for the incidental expenses of the district, the said board of trustees shall make an order, which order shall be entered in the minutes of the board and shall recite the total amount necessary to be raised and shall fix a rate designating the number of cents to be levied on each one hundred dollars of assessment valuation shown on the list prepared and approved in the manner hereinabove provided." The foregoing and all following provisions of the section, from the admitted allegations of the petition, appear to have been carefully complied with by the trustees of the district in levying and filing said assessment and issuing the bonds thereunder.

[3] There is nothing in the petition to indicate that the moneys to be derived under the assessment or from the bonds are to be employed in any new or additional work of reclamation in the district and, therefore, the present provision of section 3455(a) requiring prior approval of the state board of reclamation is without application. However, even if some modifications in the plan of reclamation were contemplated, the following reasoning would appear to be pertinent: "As long as the modifications did not materially affect the general plan, it was within the discretion of the trustees to adopt them without the direction of said

board. The purpose of said statute [in this case, section 3455(a), supra] was, of course, to secure, as far as practicable, harmony and uniformity among the various districts in the promotion of reclamation throughout the Sacramento and San Joaquin valleys, and we can see nothing in the course pursued herein tending to nullify or defeat such purpose." *Silva v. Reclamation Dist.*, 41 Cal.App. 326, 331, 182 P. 786, 788, hearing denied in this court.

Let a peremptory writ issue as prayed.

We concur: SHENK, J.; HOUSER, J.; CURTIS, J.; EDMONDS, J.; LANGDON, J.



10 Cal.2d 677

HILLSIDE WATER CO. v. CITY OF LOS ANGELES et al. (TOWN OF BISHOP et al., Interveners).

L. A. 15646.

Supreme Court of California.

Feb. 16, 1938.

Rehearing Denied March 17, 1938.

1. Waters and water courses ⇐101

The right of an overlying landowner to the circulating water beneath his lands is analogous to a riparian right and has not been destroyed by constitutional provision requiring underground waters to be utilized to their fullest extent. Const. art. 14, § 3.

2. Waters and water courses ⇐101

The owner of land overlying an underground water basin has the right to the use of the underground waters as a supporting supply for the benefit of his farming operations.

3. Eminent domain ⇐126(3)

The owners of land which overlay an underground water basin, but which also received surface irrigation from a creek, were not entitled to the total market value of their land as damages resulting from misappropriation of water from underground basin by city, but were entitled to damages only to extent that vegetation would not grow as abundantly by reason of the lower temperature of surface irrigation water and to extent that soil conditions were changed. Const. art. 14, § 3.

4. Eminent domain ⇨45

A city was not precluded from establishing a right to use of underground water outside the limits of the overlying watershed in a condemnation proceeding because of alleged lack of surplus for appropriation for such purpose. Const. art. 14, § 3.

5. Eminent domain ⇨28

A city which devoted water from underground basin to the general use of its inhabitants was not precluded from establishing a right thereto outside the limits of the overlying watershed by condemnation on ground that no public use was attached. Const. art. 14, § 3.

6. Eminent domain ⇨279(2)

When a public use has attached, a prohibitory injunction should be granted only if no other relief is adequate.

7. Eminent domain ⇨279(2)

The doctrine that the intervention of a public use will foreclose the right to an injunction rests not only on estoppel, but may be applied, though aggrieved party is ignorant of the violation of his right.

8. Eminent domain ⇨279(2)

An implied dedication to a public use is not essential to foreclose the right to an injunction when a public use has attached.

9. Eminent domain ⇨279(2)

Public policy in favor of a continuance of a public use may be invoked to prevent issuance of a prohibitive injunction.

10. Eminent domain ⇨168(3)

When a public use has attached for any recognized reason, reverse condemnation proceedings may be invoked.

11. Eminent domain ⇨279(2)

A city which owned 98 per cent. of land overlying an underground water basin and which had applied the water outside the limits of the overlying watershed to the use of its inhabitants was entitled to a reversal of judgment restraining such use, for the purpose of establishing right by reverse condemnation proceedings in which the extent of invasion of the rights of other overlying landowners could be determined and relief directed by physical adjustment or by compensation. Const. art. 14, § 3.

12. Eminent domain ⇨316

The costs of an appeal from a judgment restraining a city as an overlying landowner from appropriating water from an under-

ground water basin for use outside the watershed were awarded to complaining landowners upon reversal of judgment for purpose of permitting city to establish its right by reverse condemnation proceedings.

In Bank.

Appeal from Superior Court, Inyo County; Benjamin C. Jones, Judge.

Action by the Hillside Water Company against the City of Los Angeles and others wherein the Town of Bishop and others intervened, to restrain the misappropriation of water from an underground basin, consolidated for trial with 15 other actions in which similar relief was sought. The City of Los Angeles having acquired the rights of the Hillside Water Company, the Hillside Water Company retired from the litigation. From an adverse judgment, the defendants appeal.

Reversed.

Ray L. Chesebro, City Atty., James M. Stevens, Asst. City Atty., Carl A. Davis, and Russell B. Jarvis, Deputy City Attys., and T. B. Cosgrove, Sp. Counsel, all of Los Angeles, for appellants.

Thomas C. Boone, of Modesto, Glenn E. Tinder, of Bishop, and Preston & Braucht, of Merced (John W. Preston and Preston & Preston, all of San Francisco, of counsel), for respondents in fifteen other actions consolidated for trial and for Bishop Union Grammar School Dist. and Bishop Union High School Dist.

Walter J. Little, of San Francisco, for intervener and respondent Town of Bishop.

Randall & Bartlett, of Los Angeles, for other interveners and respondents.

SHENK, Justice.

On May 9, 1931, the plaintiff, Hillside Water Company, a corporation, filed a complaint in the superior court in and for the county of Inyo, seeking to enjoin the defendants, City of Los Angeles, and its Board of Water and Power Commissioners, from "flowing, pumping, or otherwise exporting any of the waters" from any of the defendants' water wells located on the defendants' lands overlying the underground basin known as the Bishop-Big Pine basin in Inyo county, and from diverting and transporting any of the waters from said basin to any place or land not overlying said basin.

The Bishop-Big Pine basin comprises an area of about 95,000 acres. It is located in

the Owens river watershed and is bounded (approximately) on the north by the northerly boundary of Inyo county, on the east by the Inyo mountains, on the south by Tinne-maha dam, which is about seven miles south of the Town of Big Pine, and on the west by the Sierra Nevada, a mountain range.

Within this basin is an area called the Bishop cone which is described by metes and bounds in the findings and judgment. It is of irregular shape having generally the Owens river as its northerly and easterly boundary and the easterly line of the Inyo National Forest as its westerly boundary. It is approximately 5 miles wide at a point about 8 miles westerly and northerly from the Town of Bishop, and its southern terminus is about 5 miles wide at a point some 5 miles northerly and westerly of the Town of Big Pine. The distance from its north-westerly to its southerly terminus is about 20 miles, and it follows generally the direction and flow of Bishop creek. The wells belonging to the city and complained of herein are located within the Bishop cone. It is also within this area that the lands of the plaintiffs and interveners are situated.

When the action was commenced the Hillside Water Company was the owner of approximately 6,600 acres, comprising a single tract of land within the basin. The complaint alleged the operation of about 65 wells by the defendants on the latter's lands within the basin; also the withdrawal by means of said wells of the underground waters of said basin and the diversion thereof to the City of Los Angeles, a point outside the watershed; also that such withdrawal and diversion deprived the plaintiff of waters necessary for the irrigation of its lands and otherwise invaded its property rights.

The Town of Bishop, a municipal corporation, the Bishop Union Grammar School District, a public corporation, the Bishop Union High School District, a public corporation, Hess Lumber Company, a corporation, and fourteen individuals joined in a complaint in intervention. The relief sought by the interveners was substantially the same as that sought by the plaintiff, Hillside Water Company.

Soon after the filing of the complaint in intervention fifteen other actions were commenced in the same county against the defendants named in the Hillside Water Company case, by persons owning agricultural lands located in the Bishop-Big Pine basin northerly and westerly of the Town of

Bishop. The allegations in the fifteen actions and the relief sought therein were, for all general purposes, the same as those set forth in the complaint and the complaint in intervention in the Hillside Water Company case. All of said actions were consolidated for trial. During the course of the trial the City of Los Angeles acquired title to the lands and rights of the Hillside Water Company, whereupon that company retired from the litigation.

After a rather extended trial, the court made findings in favor of the plaintiffs and interveners. It found, among other things not necessary to mention, that all the lands within the Bishop cone are situated over the same body of underground water; that underneath all of said lands there is water-bearing strata, saturated and filled with water lying at various depths beneath the surface of the ground in formations of loose rock, boulders, sand, gravel, and other materials pervious to water; that along the southern boundary of the cone there is a dyke of material impervious to water; that all the underlying area of the cone has been and is in a state of continuity from its source; that the source of the underground water is the rain and melting snow from the slopes of the adjacent Sierra Nevada and the streams flowing down the slopes of the cone; that there is but little rainfall in the vicinity of the lands of the litigants and that nothing but sagebrush will grow on said lands without irrigation or subirrigation; that said lands are fertile and with irrigation and subirrigation produce valuable crops, vegetables, and trees; that for many years prior to the commencement of the action "all parts of plaintiffs' lands were irrigated and were productive by surface irrigation, the water supply by surface irrigation being added to, and the percolation loss thereof retarded by, said underground water plane, so that the service and utility of surface irrigation was thereby increased and extended; that prior to the commencement of the acts of the defendants complained of, the level of the subterranean water under plaintiffs' lands was, in its natural and normal state, near the surface of the ground and said lands were thereby sufficiently moistened to produce crops of grass, the moistening of lawns, the raising of vegetables and the growing of trees; that all of the subterranean water within the area described as the Bishop cone in its natural and normal state, condition and quantity," was and is reasonably necessary for the

beneficial use of the lands of the plaintiffs and interveners and the proper utilization of their lands and the operation of the municipal water plant of the Town of Bishop for irrigation, domestic and agricultural purposes; that the defendants' lands, exceeding 90,000 acres, are adjacent to and a large part thereof has a surface elevation generally lower than the lands of the plaintiffs and interveners; that the general movement of the underground water of the Bishop cone is easterly and southerly from the lands of the plaintiffs and interveners toward and under the lands of the defendants; that the plaintiffs and interveners, and others entitled by the terms of the decree of the United States District Court, known as the Chandler decree, to divert all the waters of Bishop creek at their respective points of diversion, have applied all of said waters to beneficial use upon their respective lands; that said creek water is cold and retards plant growth; that excessive use of said surface water so necessarily applied has resulted in the growth of water grasses on the lands of plaintiffs and interveners; that said lands have produced smaller crops than were produced thereon prior to the removal of said subirrigation water by the acts of the defendants.

The court further found that the defendants possess, own, and operate the Los Angeles aqueduct, which runs in a general southerly direction through the Bishop cone and then in a general southwesterly direction a distance of over 200 miles to the City of Los Angeles; that the defendants have installed some 84 wells on the 90,000 acres of land owned by them in the Bishop-Big Pine basin; that 44 of their wells are within the area designated the Bishop cone; that the wells of the defendants in the Big Pine basin outside of the area called the Bishop cone are known as Big Pine group, consisting of 25 wells, and the Laws group consisting of 15 wells; that the operation in 1930 and 1931 of the 40 wells in the combined Big Pine and the Laws groups resulted in the extraction therefrom of 120,309 acre-feet of water; that the extraction of water from the Big Pine and Laws groups did not affect the water table underlying the lands of the plaintiffs and interveners; that during the same year, 1930-1931, the water extracted from wells within the Bishop cone resulted in the annual extraction of 79,688 acre-feet; that all the water so pumped and extracted by the defendants was conveyed and carried "outside the Owens river water-

shed and away from the lands overlying said subterranean water"; that all of said water so pumped and extracted was and is conveyed by the defendants by means of ditches and canals and the Owens river to and into the Owens river aqueduct owned by the defendants and by means of said aqueduct carried outside of the Owens river watershed; that the defendants intend to continue to pump and extract the subterranean water from underneath the lands of the plaintiffs and interveners by means of the wells in Bishop cone and other wells to be developed in that area; that by reason of the pumping and diversion operations of the defendants the level of the subterranean water under the lands of the plaintiffs and interveners "has been lowered a large number of feet," and to the extent that it has been impossible to "properly" surface irrigate said lands for the growing and sustenance of fruit and shade trees, vegetables and crops, because said lands have become dry and arid due to the lack of subirrigation, and the surface water placed on said lands immediately seeps into the soil and is lost; that the supply of subterranean water underlying the lands in the Bishop cone has been partially exhausted, will become completely exhausted if the defendants continue their pumping operations, and that, unless restrained, the defendants will continue such operations; that the defendants have not put the water withdrawn from underneath their lands in the Bishop cone to any consumptive use and have not diverted the same to storage; that there has been no necessity on the part of the defendants for the withdrawal by them of the water from the underground basin in the Bishop cone; that "no part of said water has been put to a beneficial or consumptive or necessary use," and that it is not true that the wells in said cone, or any of the water extracted from the underground waters therein by means of said wells, have been dedicated to a public use of the City of Los Angeles or its inhabitants; that compensatory damages will not adequately compensate plaintiffs and interveners for the injury they will sustain by reason of the wrongful acts of the defendants; that if said wrongful acts are allowed to continue the damages suffered thereby will be impossible of proof; and that the plaintiffs and interveners have no adequate remedy at law.

On its findings the court concluded that the plaintiffs (excepting Hillside Water Company) and interveners were entitled to

have the subterranean water underlying each of their respective parcels of land and underlying all of the area in the Bishop cone "remain and be in its natural and normal condition unaffected in any manner whatsoever by any of the pumping operations, or by the extractions or taking of any water, except such quantity of water as may be reasonably necessary for beneficial use and used upon the lands belonging to the defendants located within the area" described as the Bishop cone; also that the defendants should be forever enjoined from extracting or diverting away from said area in any manner whatever any of the subterranean waters in said area, or from constructing any additional wells in said area for the purposes of extracting water for use outside of said area. Judgment was entered unconditionally and perpetually enjoining the defendants in accordance with the findings and conclusions of the court. From this judgment the defendants have appealed.

Since the filing of the respondents' brief, and upon stipulation of the parties affected thereby, this court has ordered the reversal of the judgment as to all intervener-respondents save the two school districts and A. Burton. The respondents' brief will be considered to be on behalf of the plaintiffs in the fifteen independent actions who will be referred to as the respondents, and on behalf of the remaining respondent-interveners whose cases will be specially treated.

The total acreage of the respondents within the Bishop cone is approximately 640, practically all of which is under irrigation. The City of Los Angeles owns about 90,000 acres in the Bishop-Big Pine basin. All of this acreage is not within the Bishop cone. It owns or controls all the area in the cone excepting about 1,300 acres—slightly in excess of two sections. There are within the cone about 100 sections. The city therefore owns or controls about 98 per cent. of the area in the cone. Within its area the defendants, during the years 1930 and 1931, extracted by means of their Warm Springs and Bishop groups of wells a total of 79,688 acre-feet of water, which was sufficient, during that period, to supply domestic use for a population of about 300,000. It was against the operation of those two groups of wells that the trial court issued its perpetual and unconditional injunction.

The only irrigation practiced by the respondents on their lands has been and is by surface irrigation with water flowing by gravity through Bishop creek or its two

forks or through irrigation ditches leading therefrom. Each respondent enjoys an adjudicated and unrestricted water right to the waters of Bishop creek and has all the water he desires to use for irrigation from those sources. The extraction of water from the underground basin in 1930 and 1931 by means of the defendants' wells in the Bishop cone resulted in a lowering of the water table from 2½ to 4 feet. It is this lowering of the water table, the consequent greater use of the surface irrigation waters of Bishop creek, the resultant alleged decreased croppage, and the increased growth of water grass, of which the respondents complain.

The complaints were drafted and the cases were tried and decided by the trial court on the theory that the right of each plaintiff as an overlying landowner to have the underground waters remain in their natural condition was and is an absolute and unconditional right under all circumstances, regardless of the quantity of the supply or the reasonableness of the use or method of use of the water. The judgment was signed on August 21, 1934. Without doubt the trial court framed its decree and issued its injunction in accordance with the law as enunciated in such cases as *Miller v. Bay Cities Water Co.*, 157 Cal. 256, 107 P. 115, 27 L.R.A., N.S., 772, and *Herminghaus v. Southern California Edison Company*, 200 Cal. 81, 252 P. 607. The trial was held about two months after the decision of the trial court in the Lodi Case. *City of Lodi v. East Bay Municipal District*, 7 Cal.2d 316, 60 P.2d 439. Both cases were decided in the trial court before the decision of this court in *Peabody v. City of Vallejo*, 2 Cal.2d 351, 40 P.2d 486, which at some length interpreted and declared the effect of the amendment of section 3 of article 14 of the Constitution in 1928. The Lodi Case by injunctive order in effect required the use of an average annual runoff of 815,000 acre-feet of water of the Mokelumne river with its consequent wastage in order to maintain unimpaired the underground water supply of the city of Lodi of 3,600 acre-feet annually.

The present injunctive order requires that the underground water table be maintained in its natural state uninfluenced by the pumping operations of the defendants by means of its Warm Springs and Bishop groups of wells. This in effect prevents the beneficial utilization of water beneath 98 per cent (or about 90,000 acres) of the area in the Bishop cone in order that the water

table beneath 2 per cent. of this area be maintained in its natural condition. The Constitution now requires these waters "be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented."

To prevent what appeared to be an unreasonable method of the use of the underground waters and at the same time recognize and protect the rights of the city in the Lodi Case, a physical solution of the problem was declared to be available and was ordered. This seemed to be the appropriate, if not the only, course to pursue, inasmuch as the City of Lodi was a governmental agency against which under the circumstances there appearing the remedy in damages would be improper. The judgment was reversed and the cause remanded, with instructions to enter judgment accordingly. Likewise the judgment herein must be made to conform to the new state policy in whatever respect it may be in contravention thereof.

Here we are not relegated exclusively to the alternative of a physical solution. Except as to the school districts, such a solution need not be applied, for the reason that the remedy of the remaining respondents in damages is adequate.

[1-3] The law as announced in the case of *Miller v. Bay Cities Water Company*, supra, to the effect that the right of an overlying land owner to the percolating water beneath his lands is analogous to the riparian right, has not been changed, and has been recognized in the subsequent cases declaring the new law. Thereunder these respondents have had, and still have, the right to the use of the underground waters in the Bishop cone as a supporting underground water supply available to and for the benefit of their farming operations. It is readily seen that the use of this underground supply as an undersupport for irrigation or other surface uses would minimize the requirements of surface irrigation and result in benefit to the surface soil and crop conditions. And it may not be rightly said that such use is not a beneficial use of the underground waters. It is also not difficult to conclude that some detriment has resulted to the respondents' lands by the defendants' pumping operations. The extent of that detriment and its value in money may not be easy to determine, but it is not impossible of determination as the respondents urge. It is somewhere between a nom-

inal sum and the total market value of the land. It is far from the latter because of the abundant and perpetual supply of water for surface irrigation from Bishop creek and its tributaries. On the other hand, it may not be said to be nominal because of the proof that vegetation will not grow as abundantly, first, because of the lower temperature of the surface irrigation water, and, secondly, because of the resultant change in soil conditions. These changes in conditions, caused by the defendants, may affect the market value of the lands and to that extent are substantial. The nature of the soil conditions and the movement of the percolating waters necessarily rendered the question of the extent of the water table recession difficult of ascertainment and proof; but the trial court found that during the operation of the wells in the Bishop cone the extraction of water exceeded the replenishment and this finding has support in the evidence. The respondents concede that their status as holders of only 640 acres is insignificant as compared with that of the defendants who own all of the remaining water rights in the area, but they urge that in view of this unequal position of the parties the defendants should not have cast upon them, as the few survivors of a long controversy in the valley, the burden of expense and anxiety of commencing injunction proceedings, and that the defendants, in the first instance, should have filed condemnation proceedings wherein the rights of all parties could have been ascertained and safeguarded.

[4, 5] Assuming the significance of the respondents' argument that the City of Los Angeles, in the first instance, should have brought condemnation proceedings or purchased their water rights, nevertheless the opportunity is still available to accomplish that result by the process of reverse condemnation. This solution of the controversy is requested by the defendants in the event it be determined that the respondents' rights have been violated. Two objections to this course have been urged by the respondents. The first is that the trial court found that all of the water in the Bishop cone was necessary to maintain the underground water table in its natural state and therefore that there was no surplus for appropriation and use outside the watershed. But whether there be a surplus or no surplus is no obstacle to the operation of a condemnation proceeding. The second is that the trial court found that the defendants

have not devoted the waters withdrawn from the area in the Bishop cone to any beneficial use, either consumptive or storage, and that no public use had therefore attached. This finding lacks support in the record. The uncontradicted evidence is that the water pumped from this area in 1930 and 1931 was conveyed by the Los Angeles aqueduct to the distributing system of the city and devoted to the general uses of the city and its inhabitants; and that in the dry years of 1930 and 1931 the water from the Bishop cone underground supply afforded a very material portion of the city's water supply. These facts were established by the undisputed oral evidence and likewise find support in the admissions of the pleadings.

[6-11] When a public use has attached, a prohibitory injunction should be granted only in the event that no other relief is adequate. *Montecito Valley Water Co. v. Santa Barbara*, 144 Cal. 578, 77 P. 1113. In such cases compensation in lieu of injunction is preferred. *Newport v. Temescal Water Co.*, 149 Cal. 531, 538, 87 P. 372, 6 L.R.A.,N.S., 1098. The doctrine that intervention of a public use will foreclose the right to an injunction rests not only on estoppel. The doctrine may be applicable even though the aggrieved party be in ignorance of the violation of his rights. In other words, implied dedication to public use is not essential to the operation of the doctrine. Public policy in favor of a continuance of the public use may also be invoked to prevent a prohibitive injunction. *Peabody v. Vallejo*, supra, 2 Cal.2d 351, at page 378, 40 P.2d 486. When public use has attached for any recognized reason, reverse condemnation proceedings may be invoked and applied. No good reason has been advanced why such a proceeding should not be employed in this case. It would appear to be the only appropriate course to pursue. To that end the judgment must be reversed. See *Collier v. Merced Irr. Dist.*, 213 Cal. 554, 2 P.2d 790.

The intervener Burton is shown to be the owner of three lots in the Clarke addition to the Town of Bishop. He was the only intervener omitted from the order of

reversal on the stipulation hereinbefore mentioned. The judgment as to him should likewise be reversed. If his water right has been infringed by the pumping operations of the defendants, compensation therefor can be fixed in the reverse condemnation proceedings made available to the parties by the order of reversal.

A physical solution should be found and applied with reference to the rights of the school districts. The Bishop Union Grammar School has been supplied with water for drinking and garden purposes from an artesian well, the pressure of which receded during the pumping operations of the defendants. Obviously it is within the power of the defendants to insure an adequate supply of water to this school and the court should safeguard that right by its judgment without the necessity of a prohibitive injunction, with the consequence above indicated, except in aid of the enforcement of the physical solution applied.

It is conceded that the Bishop Union High School obtained water entirely from the mains of the water system of the Town of Bishop. By reason of the reversal of the judgment in favor of that town, by stipulation, it is assumed that the defendants are in control of the distributing system from which the high school was furnished with water. If so, the defendants, may by provision in the judgment, be compelled to continue the supply. If this assumption be incorrect the court, on a reversal of the judgment, will be in position to provide otherwise for an adequate water supply to this school and, by reserving jurisdiction in the premises, insure a continuance thereof.

[12] The judgment is reversed and the cause remanded for proceedings in condemnation in accordance with the views herein expressed. Under the circumstances, the respondents should receive their costs on this appeal.

The judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; NOURSE, Justice pro tem.; EDMONDS, J.

10 Cal.2d 776

**TOWN OF YREKA CITY v. WARRENS
et al.**

Sac. 5182.

Supreme Court of California.

Feb. 25, 1938.

Rehearing Denied March 25, 1938.

1. Municipal corporations $\S$ 294(7)

In view of local improvement act providing for publication of resolution of intention to do the work, that no other statute shall govern the publication, provisions of Political Code regarding publication in newspaper of general circulation is inapplicable to proceedings under the improvement act. Pol.Code, §§ 4458, 4460; St.1911, p. 730, as amended; St.1915, p. 1441, as amended; St.1923, p. 106, § 3.

2. Municipal corporations $\S$ 294(3)

The purpose of notice of resolution of intention to make public improvement is to afford interested persons an opportunity to oppose the proceeding. St.1911, p. 730, as amended; St.1915, p. 1441, as amended.

3. Constitutional law $\S$ 290(3)

The notice regarding improvements provided by improvement act constitutes due process, notwithstanding notice is permitted to be published in newspaper which has been in existence less than a year. St.1911, p. 730, as amended; St.1915, p. 1441, as amended.

4. Statutes $\S$ 94(2)

The improvement act, in so far as it provided for publication of resolution of intention to do the work, by method at variance with that required by Political Code, was not unconstitutional as special legislation where improvement act was applicable to all municipalities. Pol.Code, §§ 4458, 4460; St.1911, p. 730, as amended; St.1915, p. 1441, as amended; St.1923, p. 106, § 3; Const. art. 1, § 11; art. 4, § 25, subds. 7, 33.

5. Statutes $\S$ 94(2)

A law which, like the street improvement act, provides for all municipalities a system for opening and extending streets, is not subject to objection that it violates rule prohibiting special legislation. St.1911, p. 730, as amended; Const. art. 1, § 11; art. 4, § 25, subds. 7, 33.

6. Municipal corporations $\S$ 289(1)

Proceedings for opening, widening, and improving of streets in municipalities are proceedings calling for special treatment and

procedure, and therefore acts providing for street improvement may remove proceedings thereunder from application of general code sections.

7. Municipal corporations $\S$ 294(7)

The fact that resolution of intention to do street improvement work was not published in newspaper of general circulation, but in semiweekly newspaper which had been published for slightly less than four months, did not render proceedings and bonds issued thereunder void. Pol.Code, §§ 4458, 4460; St.1911, p. 730, as amended; St.1915, p. 1441, as amended; St.1923, p. 106, § 3.

In Bank.

Appeal from Superior Court, Siskiyou County; C. A. Paulsen, Judge.

Action by the Town of Yreka City against V. E. Warrens, also known as Victor E. Warrens, and others, to foreclose the lien of an assessment levied for street improvements. From a judgment for plaintiff, defendants appeal.

Affirmed.

William V. Cowan, of Kirkland, Wash., and Montgomery G. Rice, of Los Angeles, for appellants.

James M. Allen and Charles E. Johnson, both of Yreka, for respondent.

SEAWELL, Justice.

This is an action by the Town of Yreka City to foreclose the lien of an assessment levied for street improvements completed under the Improvement Act of 1911, St. 1911, p. 730, as amended, for which bonds were issued under the Improvement Bond Act of 1915, St. 1915, p. 1441, as amended. Defendant V. E. Warrens owns the land involved in this action and the other defendants claim an interest in or lien on said land. From a judgment for plaintiff town defendants prosecute this appeal.

Defendants contend that all proceedings were without jurisdiction and void for the reason that the resolution of intention to do the work was not published in a newspaper of "general circulation," as defined in section 4460, Political Code. Under said section a newspaper of general circulation must have been published at least a year. The trial court sustained the contention of plaintiff that under the Street Improvement Act of 1911 the resolution of intention is not required to be published in a

newspaper of general circulation as thus defined.

The case was tried on an agreed statement of facts. It appears therefrom that the resolution of intention was published in the Siskiyou Times, a semiweekly newspaper which was first published on April 5, 1927. Hence at the time of publication of the resolution of intention on July 22, 1927, and July 26, 1927, the paper had been published for slightly less than four months. At the time there were two weekly newspapers of "general circulation" in the Town of Yreka City. The relative circulation of the semiweekly compared with the older weeklies does not appear.

Section 3 of the Improvement Act of 1911 provided at the time here pertinent: "The city clerk shall cause said resolution of intention to be published twice in one or more daily newspapers published and circulated in said city; provided, if there be no daily newspaper, then the publication shall be made in one or more newspapers published and circulated therein less than six days a week, and said publication shall be had twice therein." St. 1911, pp. 730, 733, § 3, as amended St. 1923, p. 106, Deering's Gen. Laws, Act 8199.

Section 79, at the time of the publication of the resolution of intention herein, provided: "The notices, resolutions, orders or other matter required to be published by the provisions of this act, shall be published in a daily newspaper, in cities where such there is, and where there is no daily newspaper, in a semi-weekly or weekly newspaper, to be designated by the council of such city, as often as the same is issued, *and no other statute shall govern or be applicable to the publications herein provided for.* * * * No publication or notice, other than that provided for in this act, shall be necessary to give validity to any of the proceedings provided for therein." (Italics ours.) Subdivision 4, § 79, St. 1911, p. 766.

Subsequent to the completion of the improvement herein, the provision was amended in 1929 to specifically provide that the provisions of part four, title five, of the Political Code, which includes sections 4458 and 4460, should have no application to publications under the act. St. 1929, p. 1667, § 79c.

Section 4460, Political Code, defines a newspaper of "general circulation" as follows: "A newspaper of general circulation is a newspaper published for the dissemination of local or telegraphic news and

intelligence of a general character, having a bona fide subscription-list of paying subscribers, and which shall have been established, printed and published at regular intervals, in the state, county, city, city and county, or town, where such publication, notice by publication, or official advertising is given or made, for at least one year preceding the date of such publication, notice or advertisement. A newspaper devoted to the interests, or published for the entertainment or instruction of a particular class, profession, trade, calling, race, or denomination, or for any number of such classes, professions, trades, callings, races or denominations when the avowed purpose is to entertain or instruct such classes, is not a newspaper of general circulation."

Section 4458, Political Code, provides that: "Whenever any publication, or notice by publication, * * * is required to be given or made by the provisions of * * * any law of the state, by any officer, * * * such publication, or notice by publication * * * shall be given or made only in a newspaper of general circulation, where such newspaper is published within the jurisdiction of such official."

[1] Defendants contend that said Political Code sections must be read together with the provisions of the Improvement Act of 1911 to require publications under the act to be made in a newspaper of general circulation. However, section 79, subdivision 4 (now 79c) of said Improvement Act expressly provided that "no other statute shall govern or be applicable to the publications herein provided for." In view of this plain and unequivocal declaration it cannot be held that it was the legislative intent that sections 4458 and 4460, Political Code, should apply to proceedings under said act. The provisions of the act and the Political Code are otherwise inconsistent. If there is no paper of general circulation published in the city, section 4458, Political Code, requires publication "in a newspaper of general circulation, published *nearest* thereto." Section 3 of the act permits publication under such circumstances in any "newspaper published in the county in which said city is located." Under section 79 of the act the necessity of publication where there is no newspaper published and circulated in the city is dispensed with in some circumstances, and posting required in lieu thereof. The act requires publication in a daily newspaper in preference to a semiweekly or weekly, although the daily

has not been published for a year, and hence is not a newspaper of "general circulation," as technically defined by section 4460, Political Code.

Under the act publication of the resolution of intention twice in a newspaper is not the sole means provided for giving notice of a contemplated improvement. In addition the street superintendent is required to post notices of the passage of the resolution at not more than three hundred feet in distance apart along the line of the contemplated improvement, or if the work is chargeable upon a district, on all open streets within the district. Section 5. At the time of the proceedings herein it was also provided in section 5 that the council, if it deemed it advisable, might direct the clerk to mail notices to the owners in the district. This provision is now mandatory.

Other improvement acts and street opening acts likewise do not provide for publication in a newspaper of general circulation as defined in the Political Code. St. 1889, p. 70, as amended, Deering's Gen. Laws, Act 8195; St. 1903, p. 376, as amended, Deering's Gen. Laws, Act 8198; St. 1885, p. 147, as amended, Deering's Gen. Laws, Act 8194; repealed St. 1933, p. 948; St. 1913, p. 954, as amended, Deering's Gen. Laws, Act 8205. The statutes of 1889, section 23, subd. 8, and 1903, section 34, provide, as does the act before us, that "no publication or notice other than that provided in this act shall be necessary to give validity to any proceedings had thereunder."

The Improvement Acts of 1901 and 1933, on the other hand, have required notices to be published in a newspaper of general circulation. St. 1901, p. 34, as amended, Deering's Gen. Laws, Act 8197, repealed Stats. 1933, p. 1274; Stats. 1933, p. 1458.

In construing provisions for publication of notices in acts providing for other types of special districts it has been held that sections 4458 and 4460, Political Code, do not apply. County Sanitation District No. 4 v. Payne, 197 Cal. 448, 241 P. 264, construing Stats. 1923, p. 498, § 2; Midwick Country Club v. County of Los Angeles, 11 Cal.App.2d 217, 53 P.2d 1006, construing Stats. 1923, p. 431, § 2, Fire Protection District Act; Palos Verdes Library Dist. v. McClellan, 97 Cal.App. 769, 777, 276 P. 600, construing Stats. 1909, p. 815, § 3.

[2, 3] The purpose of notice of the resolution of intention is to afford interested persons an opportunity to oppose the proceeding. Sacramento Paving Co. v. An-

derson, 1 Cal.App. 672, 82 P. 1069. We are of the view that the notice provided by the act constitutes due process notwithstanding the notice is permitted by the act to be published in a newspaper which has been in existence less than a year.

[4, 5] Defendants further contend that in so far as the Improvement Act of 1911 is at variance with section 4458 and 4460, Political Code, it is unconstitutional special legislation. Article 4, § 25, subd. 7 and subdivision 33, Const.; article 1, § 11. Formerly street improvements were undertaken under special statutes relating to specific cities. See 19 Cal.Jur. 137, listing numerous special laws. But article 4, § 25, subd. 7, prohibits such special legislation. A law which, like the Street Improvement Act of 1911, provides for *all* municipalities a system for opening and extending streets is not subject to the objection that it violates the rule prohibiting special legislation. Frank v. Maguire, 201 Cal. 414, 422, 257 P. 515; City of Los Angeles v. Zeller, 176 Cal. 194, 167 P. 849; Clute v. Turner, 157 Cal. 73, 106 P. 240; Hellman v. Shoulters, 114 Cal. 136, 147, 44 P. 915, 45 P. 1057; City of Los Angeles v. Oliver, 102 Cal.App. 299, 320, 283 P. 298. The several improvement acts provide alternative procedures available to all municipalities, with differences in the notices required as well as in other matters.

[6] Proceedings for the opening, widening, and improving of streets in municipalities are proceedings calling for special treatment and procedure. (Cases cited *supra*, preceding paragraph.) Therefore, acts providing for street improvements may remove proceedings thereunder from the application of general code sections. Thus in City of Los Angeles v. Oliver, *supra*, a provision of an improvement act which fixed a different date for ascertaining the value of land taken in eminent domain than the date provided by section 1249, Code of Civil Procedure, was sustained. In Frank v. Maguire, *supra*, an improvement act provision which provided a different method for fixing damages of property taken in eminent domain than the general law was upheld. In City of Los Angeles v. Zeller, *supra*, where it was contended that an improvement act provision for waiver of a jury trial in eminent domain proceedings had thereunder was at variance with sec-

tion 631, Code of Civil Procedure, the court reaffirmed the rule that proceedings for the opening, widening, and improving of streets in municipalities are proceedings calling for special treatment and procedure.

[7] We have heretofore cited County Sanitation District v. Payne, supra; Midwick Country Club v. County of Los Angeles, supra; and Palos Verdes Library District v. McClellan, supra, which involved other types of special districts and held that sections 4458 and 4460, Political Code, did not apply to such districts. We conclude that the proceedings in the instant case were according to law.

The judgment is affirmed.

We concur: WASTE C. J.; SHENK, J.; CURTIS, J.; EDMONDS, J.; LANGDON, J.



10 Cal.2d 748

In re GUARDIANSHIP OF COPSEY'S ESTATE.

HINES v. COPSEY.

Sac. 5051.

Supreme Court of California.

Feb. 24, 1938.

1. Army and navy ☞80

Congress, to protect veterans from extortionate fees for performance of services by attorneys and to see that money allowed to veterans in insurance is properly and economically administered, possesses constitutional power to regulate charges that can be made for services rendered to applicants for compensation under War Risk Insurance Act. World War Veterans' Act 1924, § 500, as amended by Act March 4, 1925, 38 U.S.C.A. § 551.

2. Insane persons ☞69

Incompetent persons are special wards of the court, and the court must protect them and their property.

3. Army and navy ☞80

The probate court could validly allow an attorney's fee in excess of schedule set

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out in federal statute for services rendered to an incompetent veteran's guardian in procuring payment of a permanent disability benefit. World War Veterans' Act 1924, § 500, as amended by Act March 4, 1925, 38 U.S.C.A. § 551.

4. Insane persons ☞103

The fixing of attorneys' fees in estates of incompetent persons is largely in discretion of probate court.

5. Army and navy ☞80

The probate court abused its discretion in allowing an attorney's fee for services rendered to guardian of an incompetent veteran in procuring payment of permanent disability benefit at almost four times amount fixed in federal statute as compensation for an attorney who brings to a successful termination an action on such a claim, where amount was recovered upon presentation of a claim without bringing an action, and guardian's account only prayed for fixing of a reasonable attorney's fee. World War Veterans' Act 1924, § 500, as amended by Act March 4, 1925, 38 U.S.C.A. § 551.

In Bank.

Appeal from Superior Court, Mendocino County; Benjamin C. Jones, Judge.

Proceeding in the matter of the guardianship of the estate of Raymond Copsey, an incompetent. From an order allowing and approving the account of Lena Copsey, guardian, which allowed fees to the attorney of the guardian, Frank T. Hines, Administrator of Veterans' Affairs, appeals.

Order affirmed in part and reversed in part.

James B. Burns, Chief Atty., Veterans' Administrator, and A. J. Whalen, Asst. Chief Atty., both of San Francisco, for appellant.

Taft & Spurr, Arthur L. Wessels, and Frank W. Taft, all of Ukiah, for respondent.

CURTIS, Justice.

This is an appeal taken by Frank T. Hines, Administrator of Veterans' Affairs, from a portion of an order of the probate court of Mendocino county, settling the thirteenth annual account of the guardian of the estate of Raymond Copsey, an incompetent person. Raymond Copsey, the incompetent person, was a veteran of the

World War, having enlisted on September 7, 1917. His entire estate consisted of funds derived from the government of the United States, in pursuance of the World War Insurance Act, and other federal statutes providing for federal aid to soldiers who served in said war, which estate had been administered since June, 1922, by his sister, Lena Copsey, under letters of guardianship issued out of said probate court. In August, 1935, she presented to said probate court her thirteenth annual account in which she sought to have the Bank of America National Trust & Savings Association appointed as guardian in her place and stead, and also sought to have the court fix and determine a reasonable allowance monthly for the support of the aged father and mother of the incompetent. The said account set forth in detail the various sums of money received from the United States government at the rate of \$100 per month as compensation payments, and the sum of \$11,945, received in pursuance of the allowance on June 6, 1935, of a claim for permanent disability benefits under a World War insurance certificate for total permanent disability at the rate of \$57.50 per month from June 19, 1918, and paid in a lump sum to the guardian of the incompetent person by the United States government. The account also showed the total disbursements for the period subsequent to the last annual accounting of \$1,022.69, which left a balance of \$17,581.36 in the hands of the guardian. The guardian petitioned in said account that the court fix a reasonable fee to be paid to her as guardian, and also that the court fix a reasonable fee to be paid to her attorney, A. L. Wessels, for his ordinary services as attorney for the guardian since the date of the filing of the previous annual account, and also fix and determine "a reasonable sum to be paid to A. L. Wessels, for his extraordinary services as attorney for said guardian, since her appointment as guardian aforesaid on June 9, 1922, in taking all necessary proceedings, in performing all necessary acts, in preparing all necessary forms of applications, claims and documents, and in the prosecution of such claims, for the sum of \$57.50 per month due said ward under the provisions of his World War Insurance Certificate, and in securing the allowance of such claim wherein and whereby the ward was allowed and paid by the Veterans' Administration the sum of \$11,945.00 on August 1, 1930, being the amount that was due

and owing said ward under his War Risk Insurance Certificate, at the rate of \$57.50 from the 19th day of June, 1918 * * *." The order approving said account allowed to the attorney for his ordinary services since the filing of the previous annual account, the sum of \$649.49, being 5 per cent. of the gross income of said estate during said period, which income included the sum of \$11,945, received pursuant to the allowance of the claim for total permanent disability benefit to the incompetent veteran since June 19, 1918. Said order likewise allowed and authorized to be paid to said attorney by the guardian out of the estate of the incompetent veteran, "the sum of \$4,000.00 for extraordinary services rendered by him since the 9th day of June, 1922, in taking all necessary proceedings and in the prosecution of the claim of Raymond Copsey for insurance benefits under his War Risk Insurance Certificate, and in securing for him and said estate the sum of \$11,945.00, being the amount due him at the rate of \$57.50 per month under the provisions of said War Risk Insurance Certificate since the 19th day of June, 1918, down to the first day of August, 1935, and also securing for him the sum of \$57.50 per month each month from and after the first day of August, 1935, and so long as the said Raymond Copsey may live. * * *." It is from that portion of the order which allowed said fees to the attorney for said ordinary services in the sum of \$649.49, and for said extraordinary services in the sum of \$4,000 that this appeal is taken. However, no contention is made in the briefs of the appellant with reference to the allowance of attorneys' fees for ordinary services, and this question will not, therefore, be discussed.

In *Guardianship of Copsey*, 7 Cal.2d 199, 200, 60 P.2d 121, the question was presented to this court upon a motion to dismiss the appeal, of whether the administrator of veterans' affairs had the right to take an appeal from such order. It was there held affirmatively that the administrator of veterans' affairs was a party aggrieved with a right to appeal from an order allowing attorneys' fees out of the estate of an incompetent war veteran where the estate consisted of money derived from the federal government in pursuance of the World War Insurance Act and other federal statutes. The opinion further held that the fact that the administrator of veterans' affairs did not appear at the hearing of the guardian's account and object to its settlement

did not deprive him of the right to appeal therefrom.

Appellant contends that inasmuch as section 500 of the World War Veterans' Act, as amended by act March 4, 1925, 38 U.S.C. § 551, 38 U.S.C.A. § 551, fixes the fees which an attorney can receive in matters pertaining to recovery of war risk insurance matters (i. e., at a sum not to exceed \$10 for assistance in the preparation of the necessary papers in any application to the veterans' administration or, if suit be brought, such sum as a part of a judgment recovered as the court may allow, not exceeding 10 per cent. thereof, and provided that any attempt to solicit, contract for, charge, or receive any fee or compensation, except as so provided, is a misdemeanor), the allowance by the court in this proceeding of a fee of \$4,000 to an attorney for services performed in the procurement of the payment of a permanent disability benefit in the sum of \$11,945, and \$57.50 for the remainder of the life of the veteran, was clearly exorbitant and invalid, and against the express provisions of said section.

Said section 551 of title 38 of the United States Code, 38 U.S.C.A. § 551 reads as follows: "*Amount Permitted to be Paid Agents or Attorneys; Solicitation, etc., of Unauthorized Fees or Compensation; Punishment.* Except in the event of legal proceedings under section 445 of this chapter, no claim agent or attorney except the recognized representatives of the American Red Cross, the American Legion, the Disabled American Veterans, and Veterans of Foreign Wars, and such other organizations as shall be approved by the director shall be recognized in the presentation or adjudication of claims under Parts II, III, and IV of this chapter, and payment to any attorney or agent for such assistance as may be required in the preparation and execution of the necessary papers in any application to the bureau shall not exceed \$10 in any one case; Provided, however, That wherever a judgment or decree shall be rendered in an action brought pursuant to said section 445 of this chapter the court, as a part of its judgment or decree, shall determine and allow reasonable fees for the attorneys of the successful party or parties and apportion same if proper, said fees not to exceed 10 per centum of the amount recovered and to be paid by the bureau out of the payments to be made under the judgment or decree at a rate not exceeding one-tenth of each of such

payments until paid. Any person who shall, directly or indirectly, solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge, or receive, any fee or compensation, except as herein provided, shall be guilty of a misdemeanor, and for each and every offense shall be punishable by a fine of not more than \$500 or by imprisonment at hard labor for not more than two years, or by both such fine and imprisonment."

[1-3] The authority of Congress to fix fees for attorneys on claims against the government, as set forth in section 551, title 38 of the United States Code, 38 U.S.C.A. § 551, has been upheld by the Circuit Courts of Appeals of the United States. *Lopez v. U. S.*, 1 Cir., 17 F.2d 462; *Purvis v. United States*, 8 Cir., 61 F.2d 992. See, also, *Welty v. United States*, 6 Cir., 2 F.2d 562. And in *Margotin v. United States*, 269 U.S. 93, 46 S.Ct. 64, 70 L.Ed. 176, the United States Supreme Court affirmed a sentence imposed by the District Court on an attorney for receiving a fee of \$1,500 as compensation for services in preparing and presenting to the veterans' bureau a claim for insurance money under the War Risk Insurance Act. The above-cited cases deal with cases of competent veterans, and establish beyond dispute that Congress in order to protect veterans from extortionate fees for the performance of services by attorneys and to see that the money allowed to war veterans in insurance is properly and economically administered possesses the constitutional power to regulate charges that can be made for services rendered to applicants for compensation under the War Risk Insurance Act. In view of the fact that incompetent persons are made the special wards of the court, and it is the duty of the court to protect them and their property (*Guardianship of Copsey, supra*), it would seem to follow as a matter of reason and logic that attorneys' fees, in excess of the schedule set out in section 551, title 38, United States Code, 38 U.S.C.A. § 551, as permissible to be allowed an attorney for a competent veteran, could not be validly allowed to the attorney for the guardian of an incompetent veteran. Several state courts have so held. In *re Shinberg's Estate*, 238 App.Div. 74, 263 N.Y.S. 354; In *re Roy C. Minor's Guardianship*, 164 Miss. 329, 145 So. 507; *Hines v. McCoy*, 172 Miss. 153, 159 So. 306. If the government is zealous to protect competent veterans from unreasonable expense

in the collection of their claims for government aid, with how much more reason should the estates of incompetent veterans be protected from excessive charges. We are, however, squarely faced with the recent decision of the United States Supreme Court in the case of *Hines v. Stein*, as *Guardian*, etc., 298 U.S. 94, 56 S.Ct. 699, 701, 80 L.Ed. 1063, decided April 27, 1936, in which the court held: "We find nothing in any of these acts of Congress which definitely undertakes to put limitation upon state courts in respect of guardians or to permit any executive officer, by rule or otherwise, to disregard and set at naught orders by courts to guardians appointed by them." The court therein affirmed the order of the court of common pleas of Allegheny county, Pa., fixing and allowing attorneys' fees in the sum of \$100 for special services rendered by him in a guardianship matter, and rejected the contention of the administrator of veterans' affairs that the fee should be limited to actual expenses incurred and a fee of \$2. The court concludes with the statement that: "The broad purpose of regulations in respect of fees of those concerned with pension matters is to protect the United States and beneficiaries against extortion, imposition, or fraud. *Calhoun v. Massie*, 253 U.S. 170, 173, 40 S.Ct. 474, 64 L.Ed. 843. Dangers of this character are not to be expected in connection with the orderly exercise of authority by state courts over appointees properly intrusted with pension funds." Although the above case deals with compensation payments, whereas the instant case deals with insurance, and although the sections involved are different, sections 111, 114, and 115 of title 38, U.S.C., 38 U.S.C.A. §§ 111, 114, 115, being involved in the cited case, whereas section 551 of title 38, U.S.C., 38 U.S.C.A. § 551 is the section which governs and controls in the instant case, these differences do not furnish a logical basis for a distinction between the cited case and the instant case nor furnish us with a reasonable basis for holding that the case of *Hines v. Stein*, supra, is not controlling in the instant case. We are, therefore, constrained to hold, by virtue of this recent decision of the United States Supreme Court, that the probate court in the instant case could validly allow an attorney's fee for services rendered to the guardian of an incompetent veteran in excess of the schedule set out in section 551 of title 38 of the United States Code, 38 U.S.C.A. § 551.

[4, 5] However, we question whether the fee allowed in the instant case was justified under the facts before the probate court. The final account set out in minute detail the nature of the work performed by the attorney in the instant case, and the findings of the court upon which the allowance was based, as contained in the order approving the final account, follow the allegations of the petition closely. It clearly and conclusively appears from the record that the \$4,000 attorney's fee was allowed for extraordinary services performed solely in the recovery for the estate of the incompetent of said sum of \$11,945 and the future allowance of \$57.50 during the lifetime of the incompetent veteran. It further appears that no action was ever brought to recover said amount, but the same was allowed and paid to the guardian upon the presentation of a claim by her to the veterans' administration. Under the terms of section 551, title 38, of the United States Code, 38 U.S.C.A. § 551, it will be noted that in an action brought to recover permanent disability benefits, the court in such action may allow reasonable attorneys' fees not to exceed 10 per cent. of the amount recovered. While we have held that the probate court was not limited by this provision of the United States Code to the amounts therein provided to be paid attorneys in proceedings to collect thereunder, yet in our opinion, this provision does furnish some reasonable standard which courts should follow in allowing attorneys' fees in cases of this character. The fees allowed in this case by the court were almost four times as large as those permitted by section 551, title 38 of the United States Code, 38 U.S.C.A. § 551, in cases where actions were instituted and prosecuted to judgment. Here, as we have seen, no action was brought and the amount was recovered upon the presentation of a claim to the Veterans' Administration. As a general rule the work and labor involved in collecting an account without suit is far less than where suit is instituted and prosecuted to judgment. That Congress appreciated this view is shown by the provisions of said section 551 wherein the fee to be charged for the preparation of a claim under the World War Veterans' Act was fixed at \$10, but in case of suit brought and judgment rendered, fees not to exceed 10 per cent. of the amount of recovery may be charged by the attorney prosecuting the suit. We do not wish to be understood as intimating

that the fee by said section 551 for preparing a claim thereunder is adequate compensation for the services rendered by the attorney for the incompetent Copsey, yet as we understand said section, had the same services been rendered by an attorney for a competent person, the attorney would have been limited in his charges to the sum of \$10 and liable to criminal prosecution should his charge exceed that amount. *Margolin v. United States*, 269 U.S. 93, 46 S.Ct. 64, 70 L.Ed. 176. We are, however, unable to perceive upon what reasonable theory the probate court proceeded in allowing an attorney's fee for services performed in preparing a claim for presentation at almost four times the amount which the United States Code fixes as compensation for an attorney who brings to a successful termination a suit upon a like claim.

We are not unmindful of the rule that the fixing of attorneys' fees in estates of incompetent persons is largely in the discretion of the probate court. We cannot, however, reconcile the action of the probate court in this instance with a proper and reasonable exercise of the discretion vested in said court. The amount so fixed is so clearly in excess of a proper fee for such services that we think it could only have been allowed through an inadvertence on the part of the trial court, due perhaps to the fact that the allowance was unopposed. It should perhaps be noted here that the final account, a copy of which was forwarded to the administrator of veterans' affairs, contained no statement of the amount of attorneys' fees sought to be allowed, but only prayed for the fixing of a reasonable attorneys' fee. The absence of any knowledge that a fee so disproportionate to the value of the services rendered would be asked or allowed may well account for the failure of the administrator of veterans' affairs to appear in said matter. While we must concede in the face of the decision of the United States Supreme Court in the case of *Hines v. Stein*, supra, the right of the state court to fix reasonable attorneys' fees for services rendered to the guardian of an incompetent veteran, which fees need not coincide with the schedule of fees fixed by section 551 of title 38 of the United States Code, 38 U.S.C.A. § 551, nevertheless we are of the opinion that the criterion set up by congress as a measure of protection

to be afforded to a competent veteran may well serve as a standard or yardstick for a proper and reasonable fee for the same services rendered to the guardian of an incompetent veteran. And if, as measured by said standard, the allowance made by the probate court is clearly unreasonable, then it is the duty of an appellate court, upon whom, equally with the lower court, rests the duty of protecting the property and estates of incompetents and minors, to reverse said order upon the ground that the lower court in making said order abused its discretion. We are not overlooking the fact that the evidence in the instant case was not brought up on appeal. However, since the order making the allowance is predicated upon the findings setting forth in detail the nature of the work performed by the attorney, and we are satisfied that these findings are not sufficient to warrant the order made, the failure to bring up the evidence is immaterial.

For the guidance of the probate court in arriving at the proper fee to be allowed in the instant case, it may be appropriate to say that we are of the opinion that a fee which would be allowed to an attorney for a competent veteran if a suit had been brought as set out in section 551, title 38, United States Code, 38 U.S.C.A. § 551, is the maximum fee which may be allowed, and that probably a smaller fee would be more in accordance with the merits of the case. We are also of the opinion that in arriving at a reasonable attorney's fee in the present matter, the fact should be taken into consideration that the attorney in receiving \$649.49 for his ordinary services, which was 5 per cent. of the gross income for the year in which the bulk of the permanent disability benefit of \$11,945 was paid, has already received, at least in part, compensation for his services in securing the permanent disability benefit award.

That portion of the order appealed from fixing the fees of the attorney for ordinary services rendered the guardian of the incompetent is hereby affirmed, and that portion of said order fixing the fees of the attorney for extraordinary services rendered the guardian of the incompetent is hereby reversed.

We concur: SHENK, J.; LANGDON, J.; EDMONDS, J.; HOUSER, J.

25 Cal.App.2d 165

WELLS et al. v. UNION OIL CO. OF CALIFORNIA.

Civ. 2130.

District Court of Appeal, Fourth District,
California.

Feb. 24, 1938.

1. Taxation ☞

A "tax" is a charge placed upon all property real and personal lying within a given district or political subdivision.

[Ed. Note.—For other definitions of "Tax; Taxation," see Words & Phrases.]

2. Municipal corporations ☞405

A "local improvement assessment" is a charge placed upon lands within a given district to pay the benefits which the respective parcels of land derive from the improvement, and strictly speaking is not a "tax."

[Ed. Note.—For other definitions of "Local Improvement," see Words & Phrases.]

3. Municipal corporations ☞405

Assessments to be levied on land to pay the cost of improvements in improvement district, and not upon personal property within the district, were "local improvement assessments" and not "taxes." St. 1925, pp. 853, 854, §§ 3, 4.

4. Evidence ☞450(4)**Mines and minerals ☞73**

A provision in an oil lease obligating lessor to pay all special assessments would not permit of judicial interpretation or explanation by parol, since language was clear.

5. Contracts ☞143

Parties who have made their own contract are bound by its terms.

6. Contracts ☞143

The court cannot rewrite the clear terms of a lawful contract.

7. Mines and minerals ☞73

Under oil lease obligating lessors to pay all special assessments, lessors were obligated to pay assessment levied on the land under statute, to pay cost of improvements in improvement district, notwithstanding alleged character of oil lease as an interest in land. St.1925. pp. 853, 854, §§ 3, 4.

8. Appeal and error ☞110

An appeal will not lie from an order denying a motion for new trial. Code Civ. Proc. § 963, as amended by St.1933, p. 2472.

Appeal from Superior Court, Orange County; George K. Scovel, Judge.

Action by G. W. Wells and others against the Union Oil Company of California for declaratory relief and an accounting. From an order denying motion for new trial and from judgment for defendant, plaintiffs appeal.

Attempted appeal from order dismissed; judgment affirmed.

Rutan, Mize & Kroese, of Santa Ana, for appellants.

Paul M. Gregg, Jerry H. Powell and L. A. Gibbons, all of Los Angeles, for respondent.

MARKS, Justice.

Plaintiff brought this action for declaratory relief and an accounting. The controversy arose over the terms of an oil lease executed in April, 1919. It concerned the legal liability of the parties to pay local improvement assessments levied on leased lands. The trial court held such assessments payable by plaintiffs and they have appealed.

The determination of this issue depends on the interpretation to be placed on paragraph 8 of the oil lease which provides as follows:

"Taxes: The Lessee (defendant) shall, during the term of this lease, pay all taxes which may be levied upon or assessed against the buildings, machinery, tools, tanks or other personal property for improvements placed upon the demised lands by the Lessee, or oil or its kindred product stored on said land by the Lessee, and not belonging to the Lessors; and said Lessee shall pay five-sixths (5/6) of all taxes which may be levied or assessed against the land covered by this lease, during the term of this indenture, in excess of the taxes levied or assessed for the year 1918, against said land, in so far as the said excess is caused by the production of oil, gas or other hydrocarbon products from said land under this lease. In determining whether such excess is due to the oil and/or gas value thereof, the assessed value of the lands in the same general territory and of similar character (but

not leased or operated for oil or gas) shall be considered. All other taxes upon said land, and all special assessments and taxes upon oil or improvements or personal property owned by the Lessors (plaintiffs), or upon improvements or other personal property of the Lessors shall be paid by the Lessors."

Subsequent to the execution of the lease, the land was included within an improvement district organized under the Mattoon Act. St.1925, p. 849. Plaintiffs maintain that defendant should pay five-sixths of the "Special Assessment Taxes" levied to pay the costs of the improvements made in this district.

It is admitted that if these assessments are taxes and not special assessments, defendant should pay all or at least its proportion of the cost of the improvements. If they are not taxes, but special assessments, they should be paid in their entirety by plaintiffs.

[1,2] The distinction between taxes and special assessments has been clearly made by the courts of California. A tax is a charge placed upon all property, real and personal, lying within a given district or political subdivision. A local assessment is a charge placed upon lands within a given district to pay the benefits which the respective parcels of land derive from a local improvement. *Holley v. County of Orange*, 106 Cal. 420, 39 P. 790; *Los Angeles County Flood Control Dist. v. Hamilton*, 177 Cal. 119, 169 P. 1028; *Anaheim Sugar Co. v. County of Orange*, 181 Cal. 212, 183 P. 809. Strictly speaking, a local improvement assessment is not a tax at all.

[3] It is clear from the provisions of the Mattoon Act, §§ 3 and 4, pp. 853, 854, that the assessments to be levied to pay the cost of the improvements are laid upon the land and not upon personal property within the district. From this it follows, under the decisions just cited, that the levies here in question are not taxes but assessments for local improvements.

[4-7] To escape the results of this conclusion, plaintiffs urge that as an oil lease is now held to be an interest in real property (*Callahan v. Martin*, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871; *Dabney v. Edwards*, 5 Cal.2d 1, 53 P.2d 962, 103 A.L.R. 822) and as local improvement assessments are levied on the land, defendant should be required to pay its part of the assessments. This argument overlooks the

provisions of the last sentence of the paragraph of the lease we have quoted. That sentence places on the lessors the obligation of paying "all special assessments." This language is clear and does not permit of judicial interpretation or explanation by parol. *Security First National Trust & Savings Bank v. Loftus*, 129 Cal.App. 650, 19 P.2d 297. As the parties have made their own contract, they are bound by its terms. The courts cannot rewrite the clear terms of a lawful contract. *Boyer v. United States Fidelity & Guar. Co.*, 206 Cal. 273, 274 P. 57. It follows that as plaintiffs have contracted to pay "all special assessments" levied, and as the levies under the Mattoon Act here in question are special assessments and not taxes, plaintiffs must pay them.

[8] Plaintiffs have attempted to appeal from the order denying their motion for new trial. Such an order is not appealable. Section 963, Code Civ.Proc., as amended by St.1933, p. 2472.

The attempted appeal from the order denying motion for new trial is dismissed. The judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



25 Cal.App.2d 191

CITY OF ALTURAS v. ELLIOTT, City Clerk.

Civ. 6020.

District Court of Appeal, Third District, California.

Feb. 25, 1938.

1. Municipal corporations ⇨907

The statute authorizing refunding of bonds issued under improvement act of 1915 by issuance of general obligation bonds of city is constitutional. St.1915, p. 1441, as amended; St.1935, p. 2163.

2. Constitutional law ⇨143, 289

Municipal corporations ⇨907

The statute authorizing refunding of bonds issued under the acquisition and improvement act of 1925 by issuance of general obligation bonds by city was constitu-

tional as against contention it violated constitutional provisions prohibiting gifts of public money, impairment of contracts, and denial of due process of law. St.1925, p. 849, as amended; St.1935, p. 2163; p. 2164, § 1; Const.Cal. art. 1, §§ 13, 16; art. 4, § 31; Const.U.S. art. 1, § 10, cl. 1; Amend. 14.

Proceeding by the City of Alturas against E. E. Elliott, as City Clerk of the city, for a writ to compel the city clerk to countersign certain bonds of the city.

Writ issued.

C. S. Baldwin, City Atty., of Alturas (Orrick, Dahlquist, Neff & Herrington, of San Francisco, of counsel), for petitioner.

Charles Lederer, of Alturas, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Pursuant to an act of the Legislature, Statutes of 1909, page 1096, as amended in 1935, Statutes of 1935, page 2163, herein referred to as the Refunding Act of 1935, the city council of the city of Alturas called a special election for the purpose of submitting to the electors of that city the question of incurring a bonded indebtedness for the acquisition of certain municipal improvements, to wit: A general improvement fund to be used for the purpose of acquiring other general obligation bonds of the city of Alturas, or bonds issued by or for districts therein, or bonds issued for street work or other public improvements or for the issuance of bonds secured by assessments levied for such improvements.

Pursuant to this ordinance and for the purposes expressly stated in the ordinance, the electors authorized the city to issue general obligation bonds to acquire certain bonds of specified districts which were organized, and the bonds issued under and pursuant to the Statutes of 1925, page 849, and amendments thereto, and also provided for the acquisition of certain outstanding bonds issued under the Improvement Act of 1915, St.1915, p. 1441, as amended.

Respondent, as city clerk, refused to countersign the foregoing bonds, and this writ is sought to compel him so to do. To this petition respondent demurred, assert-

ing insufficiency of the facts to justify the relief sought.

[1] No question is raised as to the legal compliance with any of the statutes. Respondent also concedes that the Refunding Act of 1935 is constitutional in so far as it authorizes bonds to be issued for the purpose of purchasing or acquiring bonds issued under the Improvement Act of 1915, inasmuch as that issue was determined in *City of Dunsmuir v. Porter*, 7 Cal.2d 269, 60 P.2d 836.

However, respondent contends that the Refunding Act of 1935 is unconstitutional in so far as it purports to authorize the acquisition of bonds issued under the Acquisition and Improvement Act of 1925, claiming that it violates the provisions of section 31 of article 4 of the State Constitution in that it authorizes a gift of public money, and also violates the State and Federal Constitutions as to impairment of contracts and due process clauses. Const.Cal. art. 1, §§ 13, 16; Const.U.S. art. 1, § 10, cl. 1; Amend. 14.

[2] Section 1 of the Refunding Act, supra, St.1935, p. 2164, specifically provides that every municipal corporation may incur a bonded indebtedness to acquire any bonds issued under the Improvement Act of 1915 and the Acquisition and Improvement Act of 1925. Similarly chapter 10, Statutes of 1935, p. 28, enacted for the relief of certain assessment districts, authorized counties to issue general obligation bonds for the purchasing and acquiring of bonds, including bonds issued under the Acquisition and Improvement Act of 1925. This provision was attacked as unconstitutional in *County of San Diego v. Hammond*, 6 Cal.2d 709, 59 P.2d 478, 105 A.L.R. 1155, but the act was upheld on all grounds.

It would be of no value therefore to again review the authorities or cite reasons for the validity of the statute under attack, for a reference to *City of Dunsmuir v. Porter*, supra; *County of San Diego v. Hammond*, supra; *County of Los Angeles v. Jones*, 6 Cal.2d 695, 59 P.2d 489; *City of Los Angeles v. Aldrich*, 8 Cal.2d 541, 66 P.2d 647, is determinative of all of the issues here raised.

Therefore let the writ issue as prayed for.

We concur: THOMPSON, J.; PLUMMER, J.

WILSON v. DAVIS. *

Civ. 11589.

District Court of Appeal, Second District,
Division 2, California.

Feb. 23, 1938.

Hearing Granted by Supreme Court

April 21, 1938.

1. Wills ☞230

Where deceased's first will named plaintiff as beneficiary, and both plaintiff and defendant claimed to be sole beneficiary under second will, which had disappeared, and third will named defendant as beneficiary, and defendant wrote to plaintiff, stating that defendant would give plaintiff \$10,000 if plaintiff told truth about second will, in action to recover the \$10,000, which plaintiff claimed was promised on consideration that plaintiff withdraw probate of first will and contest of third will, defendant was entitled to instruction that if the promise was given only on consideration that plaintiff tell the truth about second will, promise lacked consideration. Civ.Code, § 1605.

2. Contracts ☞75(1)

The making of a promise to do that which promisor is legally bound to do does not furnish a valid consideration for the promise of another. Civ.Code, § 1605.

3. Appeal and error ☞110

An appeal does not lie from an order denying a new trial.

Appeal from Superior Court, Los Angeles County; Lucius P. Green, Judge.

Action by Robert J. Wilson against Effie F. W. Davis, on defendant's alleged promise to pay plaintiff \$10,000. Judgment for plaintiff for that amount, and defendant appeals.

Reversed, and purported appeal from an order denying a new trial dismissed.

William Ellis Lady, of Los Angeles, for appellant.

Phil Jacobson and Harold Prudhon, both of Los Angeles, for respondent.

WOOD, Justice.

Defendant appeals from a judgment entered in favor of plaintiff for the sum of \$10,000 upon the return of a jury's verdict. This litigation originated in the negotiations of the parties relative to their efforts to have probated two wills of the late Emma H. Wilson, who died on Octo-

ber 5, 1934. Plaintiff filed for probate a will dated May 17, 1933, in which he was named a beneficiary and the executor. Defendant filed for probate a will dated October 24, 1933, in which she was made the principal beneficiary and was named executrix. Plaintiff was not mentioned in this will. A third will was executed by Emma H. Wilson under date of August 22, 1933. There is a conflict in the testimony regarding the contents of this third will. Plaintiff testified that he was named therein as a beneficiary and defendant testified that she was the sole beneficiary. The will, however, became lost or was destroyed and was not offered for probate.

In his complaint plaintiff sets forth an instrument directed to himself and signed by defendant under date of January 20, 1934, as follows: "Dear Bob, I feel that you and I should settle our affairs between us without Lawyers so I trust you will not say anything to your Lawyers as well as myself. I will give you the equivalent of \$10,000 upon the consideration that you will tell the truth about my Dear Sister Will of Aug. 22, 1933, as you know this will left everything to me. Bob you know I worked and put my money into everything Emma bought and we both agreed that it should go to me if any thing happens to her. Lots of love to you and Margatet." In his complaint plaintiff alleged that defendant had promised to pay to him the sum of \$10,000, upon consideration "that plaintiff withdraw his contest to the probate of said holographic will under which said defendant was the principal beneficiary, and his objection to the appointment of defendant as executrix thereunder, and upon the further consideration that plaintiff would withdraw his petition to probate the will of Emma H. Wilson dated May 17, 1933, under which will plaintiff was a beneficiary, and his request to be appointed executor thereunder." By her answer defendant alleged that there was no valid consideration for the promise to pay the sum of \$10,000. She asserts that the sole consideration was an agreement on the part of plaintiff to "tell the truth about the will dated August 22, 1933."

[1,2] The defendant contends that the court erred in refusing to give to the jury the following instruction: "The Court instructs the jury that in this case the defendant has alleged that there was no consideration for the claims of plaintiff. If you find from the evidence that the

paper sued upon herein, to-wit, the one bearing the date of January 20, 1935, was given only in consideration as therein stated, that Robert Wilson tell the truth about the will of the sister of Mrs. Davis bearing date of August 22, 1933, then I charge you that there is no consideration for the reason that everyone is always required or at least expected to tell the truth of and concerning matters and things." This instruction should have been given. The principle of law set forth therein is not covered by any of the instructions given by the court. The making of a promise to do that which the promisor is legally bound to do does not furnish a valid consideration for the promise of another. *Marinovich v. Kilburn*, 153 Cal. 638, 96 P. 303; *Sullivan v. Sullivan*, 99 Cal. 187, 33 P. 862. "This is merely the converse of the rule stated in section 1605 of the Civil Code to the effect that any benefit to the promisor to which he is not legally entitled, or a detriment to the promisee which he is not lawfully bound to suffer, is a good consideration." 6 Cal.Jur. § 122, p. 179. The evidence is in sharp conflict on the question of the true consideration for the agreement sued upon. Defendant was entitled to have the jury instructed as to the principle of law applicable in case the jury should find the facts in accordance with her contention.

[3] The judgment is reversed. The purported appeal from the order denying a new trial is dismissed.

We concur: CRAIN, P. J.; McCOMB, J.



25 Cal.App.2d 182

**HERCULES GLUE CO., Limited, v.
LITTOOY.**
Civ. 10559.

District Court of Appeal, First District,
Division 2, California.
Feb. 25, 1938.

Hearing Denied by Supreme Court
April 25, 1938.

1. Specific performance ⇨71

Subject to statutory requirement of certainty and reasonableness in terms of contract, equity will specifically enforce performance of contract to convey patent rights. Civ.Code §§ 3390, 3391.

2. Specific performance ⇨71

An employee's agreement in employment contract to assign patents to employer is specifically enforceable as respects patents clearly within its terms, as strictly construed against employer.

3. Specific performance ⇨71

An employer was entitled to enforce specific performance of contract whereby employee, in consideration of salary and commission on total sales, agreed to devote his entire time and knowledge to employer's work and assign patents invented during the term of employment, as respects patents on formula invented near end of employment term, though formula was not marketed during life of contract so as to result in additional compensation to employee.

4. Evidence ⇨448

The statutes authorizing surrounding circumstances to be shown and considered in construing contracts permit introduction of evidence of prior negotiations to remove uncertainty in language of contract, but not to raise doubt in meaning of its clear terms. Civ.Code, § 1647; Code Civ.Proc. § 1860.

5. Evidence ⇨450(6)

Where written contract of employment expressly provided that employee was employed as inventor, prior negotiations indicating that he was employed only as salesman could not change meaning of contract as requiring employee to assign patents to employer. Civ.Code, § 1647; Code Civ.Proc. § 1860.

6. Specific performance ⇨49(2)

Acceptance of consideration for contract constituted waiver of any claim of inadequacy as defense to suit for specific performance of contract.

7. Specific performance ⇨49(2)

Inadequacy of consideration as preventing specific performance of a contract must be determined as of date of execution of contract, and not as of date of performance.

8. Appeal and error ⇨1012(1)

The trial court is exclusive judge of weight and effect of evidence and of credibility of witnesses, and appellate court may not change findings so as to conform to appellate court's opinion on such matters.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Suit for specific performance of contract by the Hercules Glue Company, Limited, against John F. Littooy, wherein defendant filed cross-complaint. From a judgment for plaintiff, defendant appeals.

Affirmed.

Hearing denied by Supreme Court; LANGDON, J., dissenting.

Walter H. Linforth, William M. Cannon, William M. Abbott, Cyril Appel, Ivores R. Dains, and Herbert Chamberlin, all of San Francisco, for appellant.

Byrne, Lamson & Jordan, of San Francisco, for respondent.

GRAY, Justice pro tem.

The complaint sought a decree compelling appellant to specifically perform his promise contained in the contract of the parties, dated December 26, 1928, by assigning to respondent a patent for a chemical formula, called "Fluxit 4-x." The cross-complaint asked (1) an accounting of a joint venture, which it alleged had been created by the parties' prior contract of August 27, 1924; (2) a declaration that respondent held, in trust for appellant, a patent for a formula, known as "Fluxit No. 1," which appellant had previously assigned to respondent; and (3) the reasonable value of appellant's services as an inventor. The controversy arose from the conflicting interpretations which the parties gave to the provisions of these contracts. Appellant appeals from the judgment which granted to respondent a decree of specific performance as prayed in its complaint and denied to appellant any of the relief requested by his cross-complaint. He accepts most of the findings of fact, but claims a few are contrary to the preponderance of the evidence.

Before their association, the parties had separately engaged in the sale and manufacture, according to an unpatented formula, of a chemical compound, called a "spreader" from its use to spread insecticides, mixed with it, upon trees sprayed with the mixture. On August 27, 1924, they executed a contract wherein appellant agreed to devote his entire time for three years to the sale of respondent's spreader in six northwestern states, to supply respondent with any information collected by him which would assist in the sale of spreaders, and to assign the exclusive right to use the trade-name of his spreader, and respondent promised to pay him a monthly salary of \$200, traveling expenses, and one-half of the profits on his sales.

Disputes arose as to appellant's claim for increased participation in the profits because of his efforts beyond the requirement of the contract in improving the composition of the spreader. On December 26, 1928, they executed a mutual release of all claims which each asserted against the other. At the same time, they entered into a second contract by which appellant was to be paid for five years a monthly salary of \$250, traveling expenses, and additional compensation figured on the quantity of spreader sold by either party. By the terms of this contract, appellant agreed that he would devote his entire time, knowledge, skill, best efforts, and services to the work of respondent as it might direct; that all patents, processes, or formulas, pertaining to spreader, which he invented, developed, or perfected during his original and present employment, should be the property of respondent, and that he would, on demand, execute any assignments, transfers, or other instruments necessary to perfect respondent's title thereto. He further agreed that he would not, during its life or subsequently, divulge to any person, or use for his own benefit, any secret processes or formulas invented, developed, or perfected by him or respondent between October 1, 1924, and the termination of the agreement.

In 1929, appellant invented a new formula for a spreader, called "Fluxit No. 1," and early in the next year assigned to respondent letters patent therefor. This formula he sought to recover by his cross-complaint. At first the spreader, made according to this formula, was a success, but later, after new ingredients were added as a disguise, became a failure. To remedy this, appellant ceased his selling efforts and worked in respondent's laboratory exclusively from the early part of 1931 until he voluntarily quit his employment on May 4, 1933. While experimenting in the laboratory, he discovered the basic principle of a neutral spreader which he named "Fluxit 4-x," but obtained letters patent therefor after the termination of his employment. This patent the judgment, in accordance with his agreement, ordered him to assign to respondent.

[1-3] Equity will specifically enforce the performance of a contract to convey patent rights. *Coleman v. Dawson*, 110 Cal.App. 201, 294 P. 13. But specific performance cannot be had of "An agreement, the terms of which are not sufficiently certain to make the precise act which is

to be done clearly ascertainable." Civ. Code, § 3390. Nor against a party, "If it is not, as to him, just and reasonable." Civ. Code, § 3391. An employee's agreement in the contract of employment to assign patents to his employer is specifically enforceable as to patents, clearly within its terms, as strictly construed against the employer. *Wright v. Vocalion Organ Co.*, 1 Cir., 148 F. 209; *Hildreth v. Duff*, 3 Cir., 148 F. 676; *Conway v. White*, 2 Cir., 9 F.2d 863. Since, admittedly, "Fluxit 4-x" pertained to spreaders, and was invented by appellant during his employment, he was clearly obligated to assign the patent therefor in accordance with the express terms of his agreement that all patents, pertaining to spreaders, invented by him during his employment should be respondent's property and that he would execute any assignments necessary to perfect its title thereto.

[4,5] In an attempt to raise an uncertainty in his obligation, appellant argues that other provisions of the contract which based the amount of his additional compensation on the volume of sales and statements in prior negotiations which referred to his selling, show that the contract employed him as a salesman and not as an inventor. The forepart of this argument erroneously assumes that only his sales determined his additional compensation, whereas such compensation was based upon all sales, including those made by respondent. Any doubt as to the character of the services which he was hired to perform is removed by the unambiguous language of the provision, wherein he agreed to devote his entire time, knowledge, skill, best efforts, and services to the work of respondent as it might direct. In support of the second premise of this argument, he contends that section 1647 of the Civil Code authorizes the use of such prior negotiations to explain the meaning of the contract. But the rule of evidence, embodied in this section, and also in section 1860 of the Code of Civil Procedure, permits the introduction of evidence of prior negotiations to remove an uncertainty in the language of a contract but not to raise a doubt in the meaning of its clear terms. *Barnhart Aircraft, Inc. v. Preston*, 212 Cal. 19, 297 P. 20. Since such prior negotiations could not change the meaning of the contract it is useless to state their contents in order to determine the correctness of appellant's construction thereof.

[6,7] "Fluxit 4-x" was invented late in appellant's employment and, consequently, was not marketed during the life of the contract so as to give him additional compensation from its sales. For this reason, he argues that his agreement to assign the patent was unjust and unreasonable, and therefore its specific performance was prohibited by section 3391 of the Civil Code. He does not claim that the consideration for his promise, as specified in the contract, was inadequate at the inception of the contract. Such consideration he had received as respondent promised. His acceptance of it constituted a waiver of any claim of inadequacy. *Peters v. Binnard*, 219 Cal. 141, 25 P.2d 834. But he contends rather that subsequent events made such consideration inadequate at the time he was required to fulfill his promise. His argument is unsound, for inadequacy of consideration which will prevent specific performance of a contract must be determined as of the date of its execution and not as to the date of its performance. *O'Connell v. Lampe*, 206 Cal. 282, 274 P. 336.

[8] Appellant's right to an accounting and a declaration of trust, as prayed in his cross-complaint, depends upon the nature of the relationship between the parties which their contract of August 27, 1924, created. Appellant argues that, by this contract, the parties engaged in a joint adventure. Respondent contends that the contract merely provided for respondent's employment of appellant. The court found in accordance with respondent's contention. Appellant's right to recover the reasonable value of his services as an inventor depends upon the extent of the services, which he promised to perform in the contract of December 26, 1928. Respondent asserts and appellant denies that his services as an inventor were included within the services described in the contract. This difference arises from the conflicting interpretations of the contract which have been previously considered. Appellant further argues that he is entitled to the reasonable value of his services in inventing "Fluxit 4-x" upon an implied contract since the parties had previously abandoned their written contract. On all of these controverted issues, the court found in favor of respondent. Appellant assails these findings as contrary to the preponderance of evidence. Since the trial court is the exclusive judge of the weight and effect of evidence and of the credi-

bility of witnesses, an appellate court may not change the findings so as to conform to its opinion on such matters. Hence the useless task of reviewing the evidence necessary to a consideration of appellant's criticism will not be undertaken.

The judgment is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.



25 Cal.App.2d 195

**UNION DIE CASTING CO., Limited, v.
ANDERSON.**

Civ. 6001.

District Court of Appeal, Third District,
California.

Feb. 28, 1938.

Rehearing Denied March 30, 1938.

Hearing Denied by Supreme Court
April 28, 1938.

1. Courts ⇨489(3)

The California courts have jurisdiction of actions involving contracts for patent royalties.

2. Corporations ⇨316(1)

A contract by a corporation to pay royalties to its president on a device on which he claimed to hold patents was void, where full disclosure was not made and the statute relative to the approval or ratification by the directors and stockholders of contracts, in which directors are interested, was not complied with. Civ.Code, § 311(a, b), as amended by St.1933, p. 1369.

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by Union Die Casting Company, Limited, against Edwin Anderson for rescission of contracts and restitution, in which defendant filed a cross-complaint against plaintiff. From a judgment in favor of plaintiff and cross-defendant, the defendant and cross-complainant appeals.

Affirmed.

Campbell & Campbell and C. Arden Ginery, all of Los Angeles, for appellant.

Frank M. Gunter, of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This appeal is from a judgment in favor of the plaintiff corporation against its former president, decreeing a rescission of three royalty contracts, and awarding a restitution of \$1,891.30, which had theretofore been paid by the plaintiff to the defendant Anderson. The defendant Anderson filed a cross-complaint demanding judgment in his favor in the sum of \$3,359.08. Nothing was awarded the defendant upon his cross-complaint.

The royalties under contracts mentioned were paid, and to be paid upon the manufacture and sale by plaintiff of small tilting devices to be attached to the top rail of Venetian blinds, the president Anderson claiming to hold patents thereon.

The complaint in this action is voluminous; the findings are sixty-six in number, and in the appellant's brief are attacked serially, beginning with number I and ending with LXVI, and arguments presented that not a single one of the findings is supported by the testimony.

In the consideration of this cause, however, it is incumbent upon us only to consider finding LXVI. This finding has reference to the provisions of section 311 of the Civil Code, as amended by St.1933, p. 1369, which will be considered hereafter.

The court held that the defendant Anderson, as president of the plaintiff corporation, failed to make a full, fair, and complete disclosure, and that the contracts were unfair, unjust, and unreasonable as to the plaintiff. The court also found that there was no compliance with the further provisions of section 311, supra. From which it would follow, necessarily, that the contracts were void.

The record shows that prior to November, 1928, the defendant Anderson and one Piepenbrink were engaged in partnership under the title of "Union Die Casting Company"; that on or about November 2, 1928, one J. W. Dunn conceived the idea of a tilting device to be placed upon Venetian blinds to hold the same in any position desired; that Dunn communicated his ideas to the defendant Anderson, and requested said partnership to develop the device; that Anderson thereupon began the development of the device and the work of developing the same was done entirely by employees of the corporation.

On or about January 19, 1929, the plaintiff was incorporated. After a permit had been

issued by the commissioner of corporations, the assets of the partnership, on or about February 18, 1929, were transferred to the corporation; that since February 18, 1929, up to and including the filing of the complaint herein, the plaintiff now is, and has been the owner of all the assets formerly owned by said partnership; that from January 19, 1929, to December 16, 1930, the defendant Anderson was a director and general manager of the plaintiff, in charge of all its books, assets, and records; that from December 16, 1930, to March 31, 1933, the defendant was a director and president of the plaintiff corporation; that on March 31, 1933, the defendant Anderson ceased to be president, but continued as a director of said corporation until January 18, 1934; that during all the times mentioned, while the defendant was in charge of the work carried on by the corporation, it was under the specific understanding that he would devote all of his time and attention solely to the plaintiff's interest; that after the transfer of the assets of said partnership to the plaintiff, on February 18, 1929, the employees of the plaintiff continued the development of said device, which is called in the transcript the "first device," using tools and material belonging to the plaintiff, and during the regular hours of their employment; that on or about August 22, 1929, J. W. Dunn, heretofore referred to, conceived the idea of a change in the "first device," and communicated the same to the defendant Anderson, who then had the employees of the plaintiff develop said change; that on or about November 3, 1929, the plaintiff commenced the sale of said "first device," and continued the same until about January 22, 1931, with the knowledge and consent of the defendant Anderson, and without any contract therefor, or payment of royalty to the defendant; that after the plaintiff had manufactured and sold thirty-five thousand of said tilting devices, without any payment of royalty thereon, or contract therefor, the defendant demanded that the company pay him a royalty, and contracts were thereupon issued by which the company agreed to pay to the defendant Anderson the sum of 3 cents on each device manufactured and sold by it.

It appears from the record that these contracts were entered into upon representations made by the defendant that he was the sole and exclusive inventor of the devices; that all of the work was done at his own expense, and not by employees of the company, upon the company's time, and that all

of the ideas entering into the device were made and invented by him on or about December, 1928; likewise, that no other parties had any ownership or interest in and to said device.

The record also shows that a portion of the "first device," to wit, the idea of a shaft and one gear engaging a segmental shaft, was rejected on account of a prior patent issued to a firm by the name of Wilson, Hughes & Tripp; that the firm just mentioned were manufacturing a like device, which the defendant promised he would have stopped, but knew at the time of making said promise that the manufacture of said device by others could not be stopped by reason of what we will call the "Wilson Patent."

It further appears from the record that before the device was reduced to practice, or was practicable, the defendant received the following letter from J. W. Dunn (on letterhead of Consolidated Venetian Blind Company):

"Houston, Texas.

August 22, 1929.

"Address all correspondence to home address,

"2620 Wheeler Ct.

"Houston, Texas.

"Mr. Edwin Anderson,

"2269 East 51st St.

"Los Angeles, Cal.

"Friend Anderson:

"I received the model, and with one exception it is O. K. Some better means must be developed for fastening the tapes on the center connections, and I think I have that figured out. The enclosed crude sketch will show you.

"There is one more thing, and that is the grooved pulley through which the tilting cord operates. This pulley should be thicker, with a spiral groove in it so the cord will go around twice to prevent slipping. With just one wrap as it is now, the cord will stretch and wear to such an extent that eventually it will slip through, and inasmuch as it is desirable to have the cord arranged with tassels on the ends, it should not be allowed to slip through this pulley. I know you will understand this, so will not make any sketch.

"Again, the center connections are not spaced on your sample quite wide enough to allow the tape to go between the ends of the tilt rail pieces. Space for tape is shown on sketch enclosed.

"I do not exactly like the combination center connection and worm gear device.

Tilting cords should go at the extreme end of the blind, so think it would be better to use two of the flat center connections and a separate worm gear tilting device at the end of the rail.

"Another thing. The hook on the center support which extends downward should be so designed that it is not possible for the rail to jump out when the blind is raised up.

"If we use the worm gear device at the extreme left hand end of the rail, and center connections at each tape, the center hooks should be so designed that the rail can be easily hooked in, especially because one of these connections will be located at the first tape to the right, or from four to seven inches from the worm gear device.

"You mentioned in your letter that you had taken out patent protection. I presume you took this out in your name, and will transfer it to me when all charges for models, patent fees, etc., have been paid, and you have received an order for dies and a quantity of the hardware.

"If Schatz has been of assistance in this, he is entitled to a share in the patent, or at least the privilege to use the device in his territory.

"Please write me with reference to the patents.

"I am returning the model to you by express, and request that you rebuild it as suggested and return to me.

"Don't forget to send in your bill for all this.

"Yours very truly, J. A. Dunn."

This letter shows conclusively that a separate worm gear tilting device for use at the end of a Venetian blind really had not even been thought of by the defendant.

The record shows that after the receipt of this letter, the device was changed in the company's plant by the employees of the company so as to correspond with the suggestions made in the letter written by Dunn. This work was all done by the employees of the company, upon the company's time, and with the company's material. The letter also shows that there was a specific understanding that Dunn would pay the plaintiff for all charges for the work done, and that the patent, when issued, would be transferred to Dunn, according to the custom theretofore prevailing in relation to the invention, patent, and manufacture of suggested devices. The interest of Dunn in the patented device was not disclosed to the corporation, nor the fact that the defendant had received suggestions as to how to make the device practicable had been received from Dunn.

It appears that after the device was patented, and when the defendant demanded a royalty from the plaintiff, some agreement was entered into between the defendant and Dunn relative to splitting the royalty which should be paid on the manufacture of the devices by the plaintiff and sold to the employer of Dunn. This, of course, was not disclosed to the plaintiff at the time of entering into the contracts.

[1] That the court has jurisdiction to inquire into royalty contracts has been upheld a number of times. We cite the following cases: *Deakins v. Superior Court*, 90 Cal.App. 630, 266 P. 563; *Davis v. Kittle Mfg. Co.*, 134 Cal.App. 254, 25 P.2d 253; *Stevens v. Privett*, 88 Cal.App. 706, 264 P. 549; *Spicer v. Hurley*, 161 Cal. 1, 118 P. 249.

It has been held a number of times that where an employee of a corporation invents a machine, with the aid of other employees of the corporation, and its time, material, and machinery are used in such proceeding, there is an implied obligation to permit the employer to manufacture and sell such device without the payment of royalty. To this effect we cite the following cases: *Valley Iron Work Mfg. Co. v. Goodrick*, 103 Wis. 436, 78 N.W. 1096; *Fuller & Johnson Mfg. Co. v. Bartlett*, 68 Wis. 73, 31 N.W. 747, 60 Am. Rep. 838; *Lane & Bodley Co. v. Locke*, 150 U.S. 193, 14 S.Ct. 78, 37 L.Ed. 1049.

[2] By reason of what we are about to say, we need not place our conclusions as to supporting the judgment upon the fact of the work being done in the company's shop, by company employees, upon company time, as failure to comply with section 311, as amended, *supra*, is conclusive herein. The court found upon sufficient evidence that full disclosure was not made by the defendant to the corporation at the time the contracts were entered into, he being the president of the company and under obligations to make the full contract. It appears, also, from the findings of the court and the record in this case that subdivisions a and b of section 311, as amended, *supra*, were not complied with. Those subdivisions read as follows: "(a) The fact of such common directorship or financial interest be disclosed or known to the board of directors or committee and noted in the minutes, and the board or committee authorize, approve or ratify such contract or transaction in good faith by a vote sufficient for such purpose without counting the vote or votes of such director

or directors; or (b) The fact of such common directorship or financial interest be disclosed or known to the shareholders and they approve or ratify such contract or transaction in good faith by a majority vote or written consent of shareholders entitled to vote."

Not having complied with the various provisions of section 311, as amended, supra, the contracts were not legally executed, and therefore were devoid of any binding effect upon the plaintiff.

It follows, therefore, that we need not discuss any of the sixty-five preceding findings of the court attacked upon this appeal. Finding number LXVI is sufficient to and demands an affirmation of the judgment. And it is so ordered.

We concur: PULLEN, P. J.; THOMPSON, J.



25 Cal.App.2d 161

PEOPLE v. BRENDLE.

Cr. 430.

District Court of Appeal, Fourth District,
California.

Feb. 24, 1938.

1. Criminal law ☞1166½(6)

The trial court did not commit prejudicial error in sustaining objection to uncompleted question, asked prospective juror by defendant's counsel, as to whether fact that jury which disagreed on former trial of case may have stood 10 to 2 would affect such juror's verdict, after asking jurors whether fact of previous trial would create any impression in their minds as to defendant's guilt or innocence and permitting defendant's counsel to ask each juror what effect knowledge of how other jury stood would have on him.

2. Criminal law ☞1171(3)

The district attorney, stating in closing argument to jury that he was convinced that two state's witnesses told truth, that he had known one of them for long time, that other one impressed him as being gentleman, and that latter witness did not horse-whip prosecuting witness or do anything to make him accuse defendant, as latter's coun-

sel implied, was not guilty of misconduct warranting reversal of conviction, in view of overwhelming evidence of defendant's guilt.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Miles Victor Brendle was convicted of sex perversion, and he appeals.

Affirmed.

Edgar G. Langford, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The appellant was convicted by the verdict of a jury of a violation of section 288a of the Penal Code and has appealed from the judgment.

[1] The first point raised is that the court erred in restricting the appellant's voir dire examination of prospective jurors. During this examination, after stating that there had been a previous trial in which the jury failed to agree, the appellant's counsel twice asked prospective jurors if it would have any effect upon their deliberations in this case if they should learn or hear that there had been a previous trial and that the jury had failed to agree. An objection to each of these questions was sustained, the court stating in the second instance that the general subject of inquiry was proper but the form of the question was not correct. Thereupon, the court asked the jurors whether or not they had discussed this matter with any former jurors. He further stated, "It has been intimated here this morning that this matter has been tried," and then asked the question "Now does that fact create any impression in your mind as to the guilt or innocence of this defendant?" Subsequently, counsel for appellant stated that he wished to ask each of the jurors what effect, if any, knowledge that they might acquire during the course of this trial as to the standing of the other jury would have upon them. The court replied, "They may answer that," but suggested that all of the jurors collectively be asked that question. Counsel for appellant replied that he would ask the particular juror then being examined and thereafter refer back to what he had asked this juror. The court expressed approval of this plan and counsel

for appellant asked the question: "Mrs. Savage, if you should learn the numerical standing of the jury upon the last trial of this case would that have any effect upon your verdict?" The answer was in the negative and counsel for appellant proceeded: "Q. The fact that that jury may have stood ten to two—." An objection then made was sustained and after a short argument the court said: "I think the matter has been sufficiently gone into and I am going to rule that we'dq not go into it any further."

The appellant contends that the court committed prejudicial error in refusing to allow his counsel "to interrogate the prospective jurors as to the effect of knowledge of the numerical standing of the jury in the former trial," citing *People v. Carmichael*, 198 Cal. 534, 246 P. 62. It does not appear from the record that the jurors on the former trial had divided in the proportion of ten to two. Be that as it may, the uncompleted question to which an objection was sustained amounts merely to a repetition of the preceding question which was permitted. The court had asked whether the fact that the case had been previously tried would create any impression in the minds of the jurors as to the guilt or innocence of the appellant. Counsel for appellant then stated that he wished to ask each of the jurors as to what effect, if any, knowledge as to the standing of the other jury would have upon them. Permission was given and such a question was then asked of and answered by the juror then under examination. No complaint is made that counsel was not allowed to refer back to that question in interrogating other jurors and no record is pointed out which would sustain such a contention. A compliance with the rule laid down in the case referred to sufficiently appears.

[2] The only other point raised is that the district attorney was guilty of misconduct in his closing argument to the jury, in which he said: "Murphy told you that he heard a bumping sound against the wall of that bedroom and at the same time Murphy was hearing that Connell told you that from his post outside the door he heard the bed springs going up and down and then he heard this voice in speech; and Mr. Langford has accused Connell of making that up. Now if you think, Ladies and Gentlemen, that Connell and Murphy made any of this stuff up, then I will ask

you to turn this defendant loose; because I wouldn't want to have—and I hope you believe me—any part in a prosecution where the case was framed and where my witnesses were lying. I, I hope, would be the first to raise my voice in protest against that manner of procedure, because any defendant, no matter what he is charged with under our system of jurisprudence is entitled to a fair and impartial trial, and that includes testimony on the part of witnesses who speak the truth. Thus, I am convinced in my own heart that Murphy and Connell told you the truth. It is true I have known Murphy for a long time. I have not known Connell so long nor so well, but he impressed me as being a gentleman. * * * Mr. Langford tells you that they got that boy Sandage in there—implied it—that Connell took him in that other room and horsewhipped him, or did something to him to make him accuse the defendant. Now that is not true and you know as well as I that it is not true. Connell would not do a thing like that. In the first place, Mr. Langford, or whatever lawyer would happen to get the case would find out about it and use it to his advantage in the trial."

It is argued that prejudicial error appears in that the district attorney was thus allowed to give testimony and, in effect, to vouch for the truthfulness of the witnesses Murphy and Connell. It appears that these two witnesses were members of the Navy who had been assigned to police work. At the time the crime here in question was committed they had gone to the appellant's room in a hotel, one of them listening at the door while the other listened from an adjoining room. The evidence of either was sufficient to sustain a conviction as was the evidence of Sandage, the other party to the act, whose testimony was thoroughly corroborated by certain physical facts and by the testimony of a doctor who examined the parties immediately after the crime was committed. No question is or could be raised as to the sufficiency of the evidence, which was more than ample if the evidence of these two officers be entirely disregarded. While the district attorney stated that he was convinced that these two officers had told the truth he qualified this by saying it was true that he had known Murphy for a long time. This was an admission of possible prejudice which at least served to call this to the attention of the jury. While portions of this argument should

have been omitted it is not possible to believe that the jury might have been misled thereby into doing something it would otherwise not have done. In view of the overwhelming evidence of the guilt of the appellant, it is inconceivable that any existing error could have affected the result, and no miscarriage of justice appears.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.



25 Cal.App.2d 193

PEOPLE v. PAPAJOHN.

Cr. 1985.

District Court of Appeal, First District,
Division 2, California.

Feb. 26, 1938.

Criminal law ➡ 780(4)

In abortion prosecution, instruction that jury should determine whether complaining witness or her husband, who corroborated her, was an accomplice, and that if neither was an accomplice, no corroboration of complaining witness' testimony was necessary, and failure to give instruction covering statute providing that a defendant cannot be convicted of abortion on complaining witness' testimony without corroboration constituted prejudicial error, where evidence did not show how jury found on issue whether complaining witness or her husband, if either of them, was an accomplice. Pen. Code, §§ 1108, 1111; § 274, as amended by St.1935, p. 1605.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Louise Papajohn was convicted of administering a certain medicine and substance calculated to produce a miscarriage, and she appeals.

Reversed and remanded for a new trial.

George M. Lipman, of San Francisco (Kenneth Carlton Zwerin, of San Francisco, of counsel), for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the State.

NOURSE, Presiding Justice.

The defendant was tried and convicted upon an information charging a violation of section 274 of the Penal Code, as amended by St.1935, p. 1605, in the administration of "a certain medicine and substance calculated to produce a miscarriage."

The appeal attacks the sufficiency of the evidence and of the corroboration of the complaining witness. Complaint is also made of the refusal of the trial court to instruct the jury in the terms of section 1108 of the Penal Code.

The testimony of the complaining witness detailing the treatment given her by the defendant is clear and explicit, and fully sustains the verdict in so far as her direct testimony is concerned. In this she was corroborated by her husband, who may or may not have been an accomplice, depending upon how the jury viewed the testimony of all the parties.

The failure to give the proffered instruction presents the serious problem. Section 1108 of the Penal Code provides that the defendant cannot be convicted in an abortion case on the testimony of the complaining witness, unless she is corroborated by other evidence. Section 1111 of the same Code covers the matter of corroboration of accomplices generally. The trial court instructed the jury in accordance with the latter section, defined an accomplice in the terms of that section, and advised the jury that it was to determine in the light of all the evidence "whether any of the witnesses against this defendant were accomplices." Under this instruction the jury was asked to determine whether the complaining witness or her husband was an accomplice, and the jury was advised in effect that if it found neither to be an accomplice, no corroboration of the wife's testimony was necessary. By these instructions the appellant was deprived of a substantial right because, in view of section 1108, the jury should have been told that the wife's testimony must be corroborated no matter what it found her status to be.

The failure to give the instruction covering section 1108 was error, and we cannot say that it was not prejudicial error, because under the evidence it is not possible to say how the jury found on the

issue of which one, if any, of the witnesses was an accomplice.

The judgment is reversed, and the cause is remanded for a new trial.

We concur: STURTEVANT, J.; SPENCE, J.



25 Cal.App.2d 55

Ex parte HARTMANN.

Cr. 1610.

District Court of Appeal, Third District,
California.

Feb. 14, 1938.

1. Commerce Ⓒ67

Constitutional law Ⓒ206(4), 230(2)

Municipal corporations Ⓒ622

An ordinance prohibiting person not having established place of business in the city from soliciting magazine subscriptions from house to house without obtaining permit from city police chief, for purported purpose of preventing criminals from informing themselves of possibility of committing burglary or larceny, is a valid police regulation, and does not violate Federal Constitution by burdening interstate commerce, abridging privileges or immunities of citizens of the United States, or denying equal protection of the laws, or violate state constitutional provisions requiring general laws to have uniform operation, and requiring equal privileges and immunities. Const.U.S. art. 1, § 8, and Amend. 14, § 1; Const.Cal. art. 1, §§ 11, 21; art. 11, § 11.

2. Municipal corporations Ⓒ622

As respects validity of ordinance prohibiting person not having established place of business in the city from soliciting magazine subscriptions from house to house without obtaining permit from city police chief, it could not be assumed that police chief would arbitrarily refuse to grant permit without good cause. Code Civ.Proc. § 1963, subd. 15.

3. Evidence Ⓒ83(1)

A presumption exists that every officer will perform his full duty in a fair and lawful manner. Code Civ.Proc. § 1963, subd. 15.

Original habeas corpus proceeding by Lynn Hartmann to obtain his release from the custody of the chief of police of the city of Sacramento under a warrant of arrest for violation of an ordinance prohibiting a person not having an established place of business in the city from soliciting magazine subscriptions from house to house without obtaining a permit from the chief of police.

Writ denied, and petitioner remanded to custody.

Walter B. Thompson, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., Gordon S. Hughes, Deputy Atty. Gen., and Hugh B. Bradford, City Atty., of Sacramento, for respondent.

Mr. Justice THOMPSON delivered the opinion of the Court.

By means of a writ of habeas corpus the petitioner seeks to obtain his release from custody. He is restrained of his liberty under a warrant of arrest issued from the police court of the city of Sacramento pursuant to a complaint which was filed against him in that court charging the petitioner with willfully and unlawfully soliciting in that city subscriptions to magazines without first procuring from the chief of police a canvasser's permit so to do, contrary to the provisions of Ordinance No. 166, fourth series, of that city, duly adopted and in force.

The ordinance which the petitioner is charged with violating reads as follows:

"An ordinance regulating canvassing in the City of Sacramento; defining the term 'Canvassers'; providing a penalty for a violating of this ordinance and making this ordinance an emergency measure to take effect immediately.

"Whereas, criminally inclined persons have been going from house to house in the City of Sacramento representing themselves to be agents or canvassers for newspapers, magazines, periodicals, books and all other publications, and by reason of such pretense have been able to inform themselves as to the possibility of committing burglary or larceny at the premises so visited, and that thereby the commission of such crimes has been increased and facilitated by reason of such pretense on the part of such persons, thus creating an emergency.

"Now, therefore, be it enacted by the council of the City of Sacramento, as follows:

"Section 1. The term 'Canvassers', as covered by this ordinance, is defined to be any person not having an established place of business in the City of Sacramento, who, for himself, or as agent for another, goes from place to place, and from house to house, in the City of Sacramento, soliciting orders or subscriptions for, or selling or disposing of newspapers, magazines, periodicals, books and all other publications, whether collecting advanced payments on such subscriptions or sales, or not.

"Section 2. It shall be unlawful for any canvasser, in the City of Sacramento, to go from place to place, or from house to house, for the purpose of procuring subscriptions for, or selling any newspapers, magazines, periodicals, books or other publications, without having first procured a written permit from the Chief of Police, authorizing the same. To obtain such permit, each canvasser shall appear personally before the Chief of Police and file a written application for such permit, giving the name and address of the applicant and such other information as the Chief of Police shall require. No permit shall be issued by the Chief of Police to any person who is not a bona fide canvasser, as defined in this ordinance, and the publisher of the publication for which the permit is sought, or the duly authorized agent of such publisher, which authority shall be evidenced by an instrument in writing, or by other evidence satisfactory to the Chief of Police.

"Section 3. Any person violating any of the provisions of this ordinance shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars (\$500.00), or by imprisonment in the City Jail not exceeding six (6) months, or by both such fine and imprisonment."

It is conceded the petitioner was engaged in canvassing in the city of Sacramento for subscriptions to magazines for publishing houses located outside of the state of California; that he had no established place of business in that city; and that he had not procured a permit therefor as required by the ordinance above quoted.

It is contended the ordinance is void for the reasons that it conflicts with ar-

ticle 1, section 8, of the United States Constitution, which confers upon Congress the exclusive power "to regulate Commerce * * * among the several States"; that the ordinance violates article 14, section 1, of the Federal Constitution, which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; * * * nor deny to any person within its jurisdiction the equal protection of the laws"; that the ordinance is contrary to the provisions of article 1, section 11, of the Constitution of California, which declares that "All laws of a general nature shall have a uniform operation"; and that the ordinance is also violative of the inhibition of article 1, section 21, of the California Constitution, which declares that no citizen or class of citizens shall "be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

The respondent asserts that the ordinance is a valid exercise of the police power of the city under its charter which specifically confers upon it the authority to make and enforce all laws and regulations in respect to municipal affairs; that the ordinance was adopted as a reasonable regulation to protect the inhabitants of that city against pretended canvassers who resort to that means of inspecting the premises to secure information for the purpose of enabling them to subsequently commit larceny or burglary therein.

[1] We are of the opinion the ordinance is not unconstitutional or void. On the contrary, we think it is a valid exercise of the police power of the city. It does not unlawfully regulate commerce between states, nor abridge the privileges of citizens of the United States, nor deny to any person the equal protection of the law. It applies uniformly to all individuals of the particular designated class of "canvassers" within or without the city of Sacramento, and within or without the state of California. The only exception to the uniform application of the ordinance refers to those persons who have "an established place of business in the City of Sacramento." Such excepted persons are not required to procure permits to sell magazines and periodicals in their places of business or elsewhere in the city.

The ordinance declares that criminally inclined persons have made a practice of going from house to house under the pre-

tense of canvassing for subscriptions to magazines in order to secure information to aid them in subsequently burglarizing the houses or stealing property from such premises, and that the ordinance was adopted to enable the peace officers to ascertain the good faith and honest motives of all transient canvassers for subscriptions of magazines and periodicals for the purpose of protecting the public against such unlawful practice.

The ordinance was not adopted for the purpose of revenue. It provides for the payment of no license tax. It is solely for the purpose of regulating municipal affairs under the police powers of the city to preserve the peace and general welfare of the community. It has no application to that class of cases which involve merely the levying of taxes on various classes of business for revenue only.

In considering the validity of the present ordinance, there appears to be good reason for excepting from its provisions requiring a permit to canvass for subscriptions those individuals who have established places of business within the city. Such persons having fixed places of business in the city are easily accessible and may be deemed to be known to the peace officers or at least they may be readily found and interviewed in case of reported irregularities in the conduct of their business. Canvassers are frequently transients and inaccessible to the officers. All that the ordinance requires is that every person who desires to canvass for sales or subscriptions to newspapers, magazines, periodicals, or books in Sacramento shall first personally appear and present to the chief of police for examination of his credentials, and give to the officer such other information as may tend to show his good faith in seeking to canvass the community; that he shall sign a written application therefor. Upon satisfactory showing he is thereupon entitled to a permit signed by the chief of police authorizing him to canvass for subscriptions to periodicals within the city. This procedure does not appear to be an unreasonable exercise of police authority to supervise and regulate the business of all similar canvassers within the city in the interest of honest dealing and for the protection of the public. It applies to all canvassers whether they live inside or outside of the city. In the present case, the petitioner made no such application for a permit to canvass. He proceeded to canvass the city

without authority, contrary to the provisions of the ordinance.

[2,3] We may not assume the chief of police will arbitrarily refuse to grant permits to canvass for subscriptions without good cause. The presumption is that every officer will perform his full duty in a fair and lawful manner. In *re Flaherty*, 105 Cal. 558, 562, 38 P. 981, 27 L.R.A. 529; 21 Cal.Jur. 898, § 79; section 1963, subd. 15, Code Civ.Proc.

The ordinance in question is authorized as a valid police regulation. Any county, city, or town may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws. Article 11, § 11, Const. of Calif.; *Town of Green River v. Fuller Brush Co.*, 10 Cir., 65 F.2d 112, 114, 88 A.L.R. 177; *Ex parte Haskell*, 112 Cal. 412, 44 P. 725, 32 L.R.A. 527; *E. A. Hoffman Candy Co. v. City of Newport Beach*, 120 Cal.App. 525, 8 P.2d 235.

In the *Green River Case*, *supra*, an ordinance, prohibiting peddlers from vending or soliciting sales of merchandise within that city, was held to be a valid exercise of police powers. The court said:

"It has been uniformly held that while legislative authority may not arbitrarily interfere with private affairs by imposing unusual and unnecessary restrictions upon a lawful business, yet a considerable latitude of discretion must be accorded to the law making power, and if the regulation operates uniformly upon all persons similarly situated and it is not shown that it is clearly unreasonable and arbitrary, it cannot be judicially declared to be in contravention of constitutional right."

Many federal authorities are cited in support of the preceding statement of law.

The court then declares:

"This court has frequently affirmed that the local authorities intrusted with the regulation of such matters, and not the courts, are primarily the judges of the necessities of local situations calling for such legislation, and the courts may only interfere with laws or ordinances passed in pursuance of the police power where they are so arbitrary as to be palpably and unmistakably in excess of any reasonable exercise of the authority conferred."

"We therefore conclude that the ordinance is an appropriate exercise of the police power."

With respect to the alleged interference with interstate commerce by the adoption of such regulatory ordinances, quoting with approval from the case of *Sligh v. Kirkwood*, 237 U.S. 52, 35 S.Ct. 501, 503, 59 L.Ed. 835, the court further says:

"Nor does it make any difference that such regulations incidentally affect interstate commerce, when the object of the regulation is not to that end, but is a legitimate attempt to protect the people of the state."

In conclusion it is said:

"This regulation cannot be declared invalid if within the range of the police power, unless it can be said that it has no reasonable relation to a legitimate purpose to be accomplished in its enactment; and whether such regulation is necessary in the public interest is primarily within the determination of the legislature, assuming the subject to be a proper matter of state regulation."

The case of *Ex parte Haskell*, supra, is conclusive of this proceeding. It determines that an ordinance of a city is not void on account of discrimination which requires a license to be procured by all traveling salesmen of certain specified classes of merchandise whether they live in or out of the city, but which exempts from its provisions all merchants handling the same classes of goods, who have established places of business within the city. That case is decided on the sound principle that the rule against discriminating between individuals of the same class is not violated by placing traveling salesmen and vendors of goods in one class, and merchants of the same commodities with fixed places of business in another class, because of the difference in their methods of doing business. The business of one class is transitory, while that of the other is stationary.

In the *Haskell* Case an ordinance of the city of Chico was held to be valid which imposes a license tax on all traveling salesmen of certain classes of goods who desire to solicit trade therein "outside of those conducting regular places of business" within the city. The court said with respect to the alleged discrimination of that ordinance:

"Nor is the provision in question unlawfully discriminating. It may be conceded that if it could be said to discriminate in favor of residents of the city of Chico, by requiring such license only from

nonresidents engaged in the line of business pursued by *Haskell*, it would be bad; or if it discriminated against residents of the state, or against merchandise from without, or not the product of the state, that it would be void, as being, in effect, a regulation of interstate commerce,—something entirely within the power of congress. * * * But it does neither of these. * * * The provision here involved is general in terms, and applies alike to all—residents and nonresidents equally—who do not maintain 'regular places of business' in the city. * * *

It in no way discriminates, as to the class against which it is directed, between those living within the city and those without, but is broad enough to include all of such class, wherever residing. It does put into a class by themselves those who prosecute their business by the method therein specified, and discriminates in the amount of license as between such class and merchants having their business located in the municipality, and also as between such class and persons 'selling to the trade,' as it is expressed, such as regular drummers and traveling salesmen for commercial houses, who go from place to place soliciting orders from merchants and traders. But such discrimination is lawful, and has been uniformly upheld, upon the principle that, although the different classes are engaged in the same general business of selling merchandise, it is in the several instances carried on under such different circumstances, and by methods so essentially dissimilar, and with such widely different facilities for profit, as to furnish just and reasonable ground for such discrimination."

The circumstances applying to the *Haskell* Case are similar to those which are involved in the present proceeding. In this case the ordinance exempts from the necessity of procuring a permit those who have established places of business in the city of Sacramento.

As the *Haskell* Case holds, since canvassing for subscriptions is an entirely different method of selling newspapers, magazines, and periodicals from that of disposing of them from an established place of business, they may reasonably be separately classified without violating the rule against discrimination. We are satisfied the ordinance is not unconstitutional on that account.

The case of *In re Robinson*, 68 Cal.App. 744, 230 P. 175, 176, upon which the peti-

tioner chiefly relies, is not in conflict with the Haskell Case, nor with what we have previously said regarding the principle of discrimination. In the Robinson Case, an ordinance of the city of Sacramento was properly held to be void because it clearly and unreasonably discriminated between solicitors for the sale of merchandise as between persons who conducted business outside of the city and those who conducted the same class of business in the same manner within the city. That ordinance required the outside merchant to pay a license of \$200 a quarter, and to furnish a bond of \$500. It authorized the same class of merchants having places of business established in the city for a period of three months to solicit similar trade in that city in the same manner without giving a bond, paying the license tax, or procuring a permit so to do. The distinction between that ordinance and the one involved in the present proceeding is clearly pointed out in both the Haskell and the Robinson opinions. After stating the essential facts of the Haskell Case, the author of the Robinson opinion pertinently says:

"The Chico ordinance, upheld in the Haskell Case, did not do the very thing which the Supreme Court declared would make it bad, and which thing the city council of the city of Sacramento did when adopting the ordinance now under consideration. There is a distinct and positive discrimination between solicitors carrying on the same kind of business, taking orders in the same manner, between those representing houses outside of the city of Sacramento and those within the city. One class is placed under a heavy burden, the other is exempted entirely."

The ordinance in the present proceeding, unlike the one which was involved in the Robinson Case, does not require a license tax or bond, but it does require all canvassers inside or outside of Sacramento to procure from the chief of police a permit. This ordinance is absolutely uniform in its application to all canvassers wherever they may reside. It does not apply to selling publications from an established place of business in Sacramento. But that is a different method of conducting the business. The ordinance seeks only to regulate the practice of canvassing for periodicals, magazines, and similar publications. The ordinance, in our opinion, is constitutional and valid.

The writ is denied, and the petitioner remanded to the chief of police of the city of Sacramento.

We concur: PULLEN, P. J.; PLUMMER, J.



25 Cal.App.2d 750
Ex parte ALBRECHT.
Cr. 1611.

District Court of Appeal, Third District,
California.

Feb. 14, 1938.

Commerce ⇨67

Constitutional law ⇨206(4), 230(2)

Municipal corporations ⇨622

An ordinance prohibiting person not having established place of business in the city from soliciting magazine subscriptions from house to house without obtaining permit from city police chief, for purported purpose of preventing criminals from informing themselves of possibility of committing burglary or larceny, is a valid police regulation, and does not violate Federal Constitution by burdening interstate commerce, abridging privileges or immunities of citizens of the United States, or denying equal protection of the laws, or violate state constitutional provisions requiring general laws to have uniform operation, and requiring equal privileges and immunities. Const.U.S. art. 1, § 8, and Amend. 14, § 1; Const.Cal. art. 1, §§ 11, 21; art. 11, § 11.

Original habeas corpus proceeding by William Albrecht to obtain his release from the custody of the chief of police of the city of Sacramento under a warrant of arrest for violation of an ordinance prohibiting a person not having an established place of business in the city from soliciting magazine subscriptions from house to house without obtaining a permit from the chief of police. Petitioner contends that the ordinance violates article 1, sections 11 and 21, of the Constitution of California, and article 1, section 8, and Amendment 14, section 1, of the Federal Constitution. Article 11, section 11, of the California Constitution is also involved.

Writ denied, and petitioner remanded to custody.

Walter B. Thompson, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., Gordon S. Hughes, Deputy Atty. Gen., and Hugh B. Bradford, City Atty., of Sacramento, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

This is a petition for a writ of habeas corpus. The petitioner is deprived of his liberty under a warrant issued from the police court of the city of Sacramento, based on a charge of violating the provisions of an ordinance of that city, No. 166, fourth series, which requires all persons desiring to canvass for subscriptions of newspapers, magazines, periodicals, and books in Sacramento, to first procure from the chief of police a written permit to do so.

The issues which are presented on this proceeding are precisely the same as those which were involved in a similar proceeding, entitled In the Matter of the Application of Lynn Hartmann for a Writ of Habeas Corpus, 76 P.2d 709, the opinion in which we have this day filed. That opinion is determinative of all the issues of this case.

On the authority of that case the writ of habeas corpus is denied, and the petitioner remanded to the chief of police of the city of Sacramento.

We concur: PULLEN, P. J.; PLUMMER, J.



25 Cal.App.2d 112

PEOPLE v. KINNE.

Cr. 3033.

District Court of Appeal, Second District,
Division 1, California.

Feb. 18, 1938.

I. Rape ☞11

Where nude man on street grabbed woman by neck, struck her mouth, and said, "you had better not scream," and woman permitted man to lead her into vacant lot and complete attack, man's conduct amounted to threat of "great and immediate bodily

harm" within statutory definition of rape, and woman's ostensible consent was no defense. Pen.Code, § 261, subd. 4.

[Ed. Note.—For other definitions of "Great Bodily Harm," see Words & Phrases.]

2. Criminal law ☞1023(10)

No appeal lies from the sentence in criminal prosecution.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Donald A. Kinne was convicted of rape, and he appeals.

Affirmed, and appeal from the sentence dismissed.

Earl D. Killion, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., for the People.

DORAN, Justice.

The defendant, accused by information of the offense of rape, was found guilty by the court, sitting without a jury. It was stipulated at the trial that the issue should be submitted to the court on the transcript of the evidence introduced at the preliminary hearing. This appeal is from the sentence and judgment, and from the order denying defendant's motion for a new trial.

The evidence reveals the following facts: The prosecutrix was 22 years of age and a seamstress by occupation. She was a single woman at the time of the alleged attack, but had previously been married. On the night of June 16, 1937, she was waiting for an electric car in the Pacific Electric Station in North Hollywood. Defendant at that time and place walked up to her and asked her for a match, which she gave to him. She later boarded the car, and the defendant also boarded the same car. They occupied different seats in the car and nothing more was said between them. The prosecutrix left the car at her destination, namely, Laurel Canyon boulevard; she resided about one-half mile from the street car track. At this point, although the defendant had paid his fare to a point beyond Laurel Canyon boulevard, he also left the street car. He walked along the same street as the prosecutrix and in the same direction but on the opposite side of the street for about a block, when he disappeared. The prosecutrix testified that when she was about a block from Califa street, the street upon which she resided,

she heard some one walking behind her. She turned around and as she did so, the defendant grabbed her around the neck and struck her in the mouth and said, "You had better not scream." The prosecutrix then and there observed that the defendant was entirely nude. Defendant then took the prosecutrix by the hand and pushed her along Laurel Canyon boulevard, about 100 feet back into a vacant lot under some apricot trees; pushed her down and pulled up her clothes, and completed the attack upon which the alleged offense is based. The defendant then left, whereupon the prosecutrix immediately went out into the street, hailed a passing motorist, and told him what had occurred. She was then taken to the North Hollywood police station. She further testified that she did not resist because she was scared and was afraid to resist.

Defendant testified, in substance, that the prosecutrix consented to the act and co-operated.

[1] Appellant contends, as the only grounds of appeal, that the evidence affirmatively shows that the prosecutrix did not make that resistance which the law requires before a conviction of rape by force can be sustained. In that connection the prosecutrix testified as follows: "I couldn't prevent it. We pick up the papers and hear about people being beat up and murdered. If I hadn't given in he would have beat up on me more and it would be pitiful." Obviously the same question raised herein on appeal was presented to the trial judge at the time of the trial, and, from a review of the evidence, it cannot be said that the trial judge erred as a matter of law in adjudging the defendant guilty. The evidence justifies the inference that consent, if there was such consent, on the part of the prosecutrix was not actual but merely ostensible, and that the remark of the defendant accompanied by the assault, under the circumstances, amounted to such a threat of "great and immediate bodily harm" as is contemplated by subdivision 4 of section 261 of the Penal Code. It requires no strain on the imagination to appreciate the plight of the prosecutrix, who, with but a moment to contemplate the consequences, could not be expected to exercise the calm judgment with which appellant now contends she should have been possessed. What would have happened to the prosecutrix at the hands of the defendant, if she had pursued a different course, is problematical.

The following authorities review situations somewhat similar: *People v. Bonzani*, 24 Cal.App. 549, 558, 141 P. 1062; *People v. Norrington*, 55 Cal.App. 103, 108, 202 P. 932; *People v. Cline*, 117 Cal.App. 181, 184, 3 P.2d 575; *People v. Goldsmith*, 130 Cal.App. 443, 445, 20 P.2d 107; *People v. Cook*, 10 Cal.App.2d 511, 514, 52 P.2d 538.

[2] There are no errors in the record, and the judgment and order appealed from are affirmed. Since no appeal lies from the sentence, the attempted appeal in that regard is dismissed.

We concur: YORK, P. J.; WHITE, J.



25 Cal.App.2d 120

PEOPLE v. BAKER.

Cr. 3012.

District Court of Appeal, Second District,
Division 1, California.

Feb. 18, 1938.

1. False pretenses ☞38

Indictment and information ☞176

In prosecution for grand theft, neither proof of exact amount involved nor of exact time of theft is necessary to support a conviction. Pen.Code, §§ 955, 956.

2. Criminal law ☞1186(4)

In prosecution for grand theft of \$1,304.11 on or about October 5, 1936, accused was not entitled to complain that proof showed a taking of \$500 on October 5, 1936, and of \$804.11 on October 17, 1936, on ground that there was a "fatal variance" between pleading and proof; it having been established that the \$804.11 was obtained by means of false pretenses, and accused not having been misled. Pen.Code, §§ 955, 956; Const. art. 6, § 4½.

[Ed. Note.—For other definitions of "Fatal Variance," see Words & Phrases.]

3. Criminal law ☞878(1)

Groundless challenges to the propriety of a conviction under first count of an indictment on ground of variance between pleading and proof did not authorize reversal of conviction under second count on ground

that jury may have been influenced in its verdict on second count by verdict reached on the first count.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Claude A. Baker was convicted of grand theft, and he appeals.

Affirmed.

John R. Barta and A. J. Fritz, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., for the People.

DORAN, Justice.

Defendant was found guilty by a jury, of two counts of grand theft. This appeal is from the judgment and from the order denying defendant's motion for a new trial.

The record reveals that the alleged offenses arose out of a business transaction between the defendant and a finance company. It appears that the defendant and the finance company entered into an agreement, by the terms of which the defendant agreed to sell, and the finance company agreed to buy, certain conditional sales contracts.

Defendant was engaged in the business of manufacturing and selling "Min-O-Zone" machines, used in the sterilization of water, etc., and in the disinfection of sugars. In connection with the transactions between defendant and the finance company, defendant sold a contract to the finance company representing the sale by him of three "Min-O-Zone" machines to a sugar company at Oxnard, Cal. The terms of sale of the machines provided that they were to be operated on trial, and the purchaser reserved the privilege of returning them to the seller if the machines were found to be unsatisfactory. The contract was sold to the finance company at a discount; the payments on said contract, by the sugar company, were to be made as follows: "* * * Three Hundred Ninety-Six and $\frac{87}{100}$ Dollars (\$396.87) on or before September 15, 1936, if equipment is accepted by us; and balance of One Thousand Nine Hundred Forty and $\frac{63}{100}$ Dollars (\$1940.63) in eight equal instalments of Two Hundred Forty-Two and $\frac{58}{100}$ Dollars (\$242.58) payable on the 15th day of each calendar month beginning September 15, 1936." In connection with this transaction the finance company paid defendant the sum of \$500 on October 5, 1936. On October 9, 1936,

defendant was notified by the sugar company that the machines were unsatisfactory. Thereafter, to wit, on October 17, 1936, defendant collected the further sum of \$804.11, upon said contract, from the finance company.

Count I of the indictment alleged the theft of \$1,304.11, on or about October 5, 1936. It is contended by appellant, "That it can not be determined from the verdict whether the jury found the defendant guilty in taking the \$500 on October 5, 1936, or the \$804.11 on October 17, 1936, in finding him guilty on Count One of the indictment"; and that "there is a fatal variance between the indictment and the proof."

[1, 2] If the indictment had alleged one offense based on the receipt of the \$500, and another offense based on the receipt of the \$804.11, the claim that the evidence would support a judgment of conviction as to the count based on the \$500 item would be open to question. But such a question is not presented on the appeal herein, nor was such a question presented to the jury. The only question the jury was required to determine on the issue raised by the indictment as to count I was, whether the defendant was guilty of the theft of \$1,304.11 on or about October 5, 1936. It is well settled that proof of the exact amount alleged to have been involved in the theft is not necessary, nor is proof of the exact time necessary, to support a verdict of guilty. Pen.Code, §§ 955, 956; *People v. Fleming*, 220 Cal. 601, 32 P.2d 593. The indictment was sufficient in every respect, and the defendant, under the circumstances, could not have been misled by the development of the evidence during the progress of the trial. It was definitely established that the \$804.11 was obtained under and by virtue of false pretenses, and the defendant is in no position to complain because proof in this regard as to the \$500 item was wanting. There was no miscarriage of justice. Article 6, section 4½, of the Constitution of California.

[3] Count II involved the sale by defendant to the finance company of an alleged contract in connection with the purchase of a "Min-O-Zone" machine by a sugar company at Mason City, Iowa. The agreement between defendant and the finance company authorized defendant to collect the payments due on the conditional sales contracts purchased by the finance company, which collections were required by the terms of said agreement to be forth-

with remitted to the finance company. Count II is based on the alleged unlawful appropriation by defendant of moneys collected from the sugar company at Mason City, Iowa.

Appellant contends that, "On account of the errors above mentioned as to Count I the jury may have been influenced as to its verdict on Count II, and therefore the whole case should be reversed." In the light of the foregoing reasoning with regard to the disposition of count I, such argument is without merit.

The judgment and order appealed from are affirmed.

We concur: YORK, P. J.; WHITE, J.



25 Cal.App.2d 115

PEOPLE v. GOLEMBIEWSKI.

Cr. 3016.

District Court of Appeal, Second District,
Division 1, California.

Feb. 18, 1938.

1. Burglary $\Rightarrow$ 42(1)

Mere unexplained possession of stolen property is insufficient to justify possessor's conviction of burglary, but may be considered with other incriminating evidence in determining his guilt or innocence.

2. Burglary $\Rightarrow$ 42(1)

Accused, shown by evidence in burglary trial to have received stolen property shortly after theft, was bound to explain his possession thereof in order to remove effect of such possession as circumstance tending to show his guilt.

3. Burglary $\Rightarrow$ 42(1)

Evidence held sufficient to show defendant's possession of stolen property under circumstances justifying trial court's conclusion that he was guilty of burglaries charged.

4. Criminal law $\Rightarrow$ 254

Where evidence is open to two equally reasonable constructions, one of which points to defendant's guilt of lesser degree of crime

charged than the other, court must adopt former theory. Pen.Code, § 1097.

5. Burglary $\Rightarrow$ 41(5)

The trial court was bound to resolve doubt as to whether defendant was guilty of first or second degree burglary in his favor and find him guilty of lesser degree, where evidence indicated that victim slept from 1 to 9 o'clock on morning of crime, and there was no evidence that crime was committed in nighttime or that defendant was armed or assaulted any one. Pen.Code, §§ 460, 1097.

6. Criminal law $\Rightarrow$ 1188

The appellate court may right injustice done by trial court in finding defendant guilty of, and imposing penalty for, higher degree of crime charged than evidence warranted by remanding cause for entry of judgment finding him guilty of lesser degree of crime, instead of ordering new trial. Pen. Code, § 1181, subd. 6, as amended by St.1933, p. 1341.

7. Criminal law $\Rightarrow$ 466

The trial court did not err in sustaining objection to defendant's cross-examination of police officer on burglary trial as to comparison of defendant's handwriting according to exemplars made after his arrest with signature in pawnbook of secondhand dealer who purchased some of stolen property, especially where foundational questions requisite to qualify witness as person familiar with defendant's writing were not asked.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Frank Golembiewski was convicted of second degree burglary, charged in the first two counts of an information, and first degree burglary alleged in the third count, and he appeals.

Affirmed as to first two counts, and modified, cause remanded with directions, and judgment, as modified, affirmed as to third count.

John R. Barta and William F. Barta, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., for the People.

WHITE, Justice.

After trial before the court sitting without a jury, appellant was convicted of two counts of burglary of the second degree as charged in counts I and II, and one count of

first degree burglary as alleged in count III, of an information filed by the district attorney. He appeals from the judgment and from an order denying his motion for a new trial.

It is first contended by appellant that there is no evidence which tended to connect him with the commission of the offenses charged, except the mere fact that he was found in possession of articles of personal property which, according to the testimony, had been stolen from the respective rooms occupied by the owners of the stolen property.

Epitomized, the facts leading to the apprehension of appellant and to the accusations against him are, that a secondhand dealer, on the morning of the burglary alleged in count I, purchased from defendant a radio and a suit of clothes identified at the trial as a radio and clothing similar to the articles alleged in said count to have been stolen. The secondhand dealer noted the license number of the automobile occupied by appellant when the sale of the aforesaid property was consummated, and transmitted such license number to the police. Fortified with this information, the police apprehended appellant while he was occupying the automobile bearing the reported license number. At the time of the apprehension officers found what is commonly known as a "jimmy" and a glass cutter in the rear of appellant's automobile, and also found in appellant's pocket a wallet identified at the trial as among the stolen articles. Upon searching the room occupied by appellant, the police found therein a rope ladder together with numerous articles taken in the burglaries alleged in counts II and III of the information. When the officer asked appellant if he would tell where he had sold property which he had stolen from various people so that it could be returned to them, appellant's reply was, "I will think it over." It might here be observed that certain of the property stolen in the respective burglaries, consisting of certain papers and certificates, were found by the police secreted under the rug in appellant's room. Also discovered in appellant's living quarters was a pair of black tennis shoes characterized by the officer at the trial as "sneakers." Noting that the shoes had originally been white the officer inquired of appellant why he had dyed them black, to which the latter replied, "Because I like black better than white." The defendant introduced no evi-

dence at his trial nor did he take the stand in his own defense.

[1-3] While the mere possession of stolen property unexplained by the defendant is not of itself, and standing alone, sufficient to justify a conviction of burglary, even if it be shown to a moral certainty and beyond a reasonable doubt that by some one the alleged burglary was committed, yet such possession of stolen property is a circumstance which, taken in connection with other incriminating evidence in the case, may be considered by the court or jury in determining the question of the guilt or innocence of a defendant so charged. *People v. King*, 8 Cal.App. 329, 96 P. 916; *People v. Keko*, 27 Cal.App. 351, 352, 149 P. 1003. If the court below believed from the evidence that the property mentioned in evidence was stolen from the premises described in the testimony, and, as in the instant case, received into the possession of the defendant shortly after being stolen, the failure of the defendant, to account for such possession, or to show that such possession was honestly obtained, is a circumstance tending to show his guilt, and the accused is bound to explain the possession in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts such as the evidence herein disclosed. *People v. Abbott*, 101 Cal. 645, 647, 36 P. 129. Without further reviewing the facts, it is sufficient to say that the defendant was found in possession of the stolen property mentioned in each of the counts contained in the information under circumstances which justified the trial court in concluding that he was the guilty party in the burglaries charged against him.

[4-6] Appellant next contends that as to count III, he should have been found guilty, if guilty at all, only of burglary of the second, and not of the first, degree. In support of this proposition appellant cites section 1097 of the Penal Code to the effect that where there is a doubt as to the degree of the crime, a defendant can only be convicted of the lesser degree. As to this count the evidence shows that the complaining witness retired about 1 a. m. on the morning of May 19, 1937, and that when he awoke about 9 o'clock that morning he discovered that his trousers and billfold were missing. This is the property which, together with other articles, was discovered by the arresting officer upon the person of appellant, or beneath the rug in his room.

Section 460 of the Penal Code provides that a burglary of inhabited premises committed in the daytime by a person who is not armed with a deadly weapon and who does not, while in the commission of such burglary, arm himself and who assaults no one in the commission of such burglary, is burglary of the second degree. It is the rule that where evidence is open to two equally reasonable constructions, one of which points to the guilt of the defendant of a higher degree of a crime, and the other to his guilt only of a lesser degree thereof, the court must adopt that theory pointing to guilt of the lesser degree. In the case before us the evidence indicates that the victim of the burglary, alleged in count III, retired and slept from 1 to 9 o'clock on the morning of the crime. There being no evidence either direct or circumstantial to indicate that the crime was committed in the nighttime, or that the defendant was armed, or assaulted any one, while there is evidence to indicate that it might well have been committed between daylight and 9 a. m. of the morning in question, the court was bound to resolve that doubt as to the degree of the crime in favor of the accused and to find him guilty of burglary of the lesser or second degree. That the crime of burglary as charged in count III was committed and that the appellant committed it, are firmly established by this record. No miscarriage of justice, therefore, resulted, except that, as a matter of law, the court improperly fixed the degree of the crime and imposed the penalty therefor. That injustice may now be righted by this court without subjecting the state and the defendant to the delay and expense of a new trial. *People v. Kelley*, 208 Cal. 387, 393, 281 P. 609; section 1181, subd. 6, Pen.Code, as amended by St.1933, p. 1341.

[7] Appellant next asserts that the trial court fell into error in sustaining the objection of the prosecution to his cross-examination of Officer Bailey relative to a comparison of the handwriting of appellant with the signature that appeared in the pawn book of the secondhand dealer who purchased some of the stolen property. Appellant's claim in this regard is without merit. The questions asked by appellant were not proper cross-examination, nor were the requisite foundational questions

asked of the witness to qualify him as a person familiar with the writing of the appellant. The exemplars of appellant's handwriting that were submitted to the officer were made after the arrest of defendant and in this connection we find, in the case of *People v. Briggs*, 117 Cal.App. 708, 711, 4 P.2d 593, 595, the court commenting upon comparisons of the writing of an accused made subsequent to his arrest, in which case this court quotes with approval the language used in the case of *Williams v. State*, 61 Ala. 33, at page 40, as follows: "But it would open too wide a door for fraud, if a witness was allowed to corroborate his own testimony, by a preparation of specimens of his writing for the purposes of comparison. By design a correspondence with, or a departure from the disputed writing could be fabricated; and whether there was such design, is an enquiry with which the jury should not be embarrassed." The evidence indicates that the defendant had a bank account and it seems to us that if he desired to prove, by comparison, that his genuine signature was not the one in the pawnbroker's book, he could have produced the bank officials, who were familiar with his signature as it appeared upon his identification card and checks, to testify as to the similarity or lack of similarity of his genuine signature with the one appearing on the pawnbroker's book. This the defendant failed to do. In fact, he offered no defense whatsoever.

There is nothing further in the record demanding our attention.

For the foregoing reasons it is ordered that the judgment and the order denying appellant's motion for a new trial as to counts I and II be, and the same are, hereby affirmed.

As to count III, the order denying appellant's motion for a new trial is affirmed, and the judgment of the lower court finding the defendant guilty of burglary of the first degree as charged in count III is modified to a judgment finding the defendant guilty of burglary of the second degree, and the cause is remanded to the trial court, with directions to enter a judgment accordingly, and which judgment as so modified is affirmed.

We concur: YORK, P. J.; DORAN, J.

25 Cal.App.2d 168

EDWARDS et ux. v. LEWIS et al.

Civ. 2128.

District Court of Appeal, Fourth District,
California.

Feb. 24, 1938.

Hearing Denied by Supreme Court
April 25, 1938.**1. Deeds** ⇨99

Where a deed refers to another instrument with a reference sufficiently certain to identify it, the other instrument is regarded as incorporated in the deed as a part thereof.

2. Waters and water courses ⇨156(2)

A vendor who contracted to sell realty and who joined in a deed to purchaser was a primary party to agreement to furnish purchaser with specified amount of water which existed by reference in deed to the contract which provided for water for the realty.

3. Evidence ⇨460(4)

An interest in realty can only be conveyed by an instrument in writing, and, when ambiguity in a deed does not exist, parol evidence is not admissible to supplement the description.

4. Evidence ⇨450(3)

Parol evidence is admissible to explain ambiguity existing in a deed.

5. Evidence ⇨450(3)

In action based on failure to supply purchaser of realty with water, wherein liability of a grantor depended upon whether there was sufficient reference in the deed to a prior contract of sale providing for water for the property, parol evidence was admissible to explain ambiguity created by fact that the contract contained two dates and one of the dates was correctly referred to in deed.

6. Waters and water courses ⇨156(2)

In action based on failure to furnish purchaser of realty with water, wherein liability of a grantor depended upon whether a prior contract of sale providing for water for the property was sufficiently incorporated by reference in the deed, terms of contract concerning water were incorporated in deed and grantor was bound by them, where evidence showed that contract containing two dates, one of which was correctly referred to in deed, was the only contract in existence, and was the one to which parties intended to refer in the deed.

7. Waters and water courses ⇨156(2)

The obligation created by a contract of sale incorporated by reference in deed, under which obligor agreed to furnish property with water twice a month, through a pipe, created a continuing obligation to furnish water and a specific interest in the portion of the distributing system mentioned.

8. Appeal and error ⇨1073(1)

The failure of a judgment to quiet title formally as prayed did not require reversal of judgment, even though title should have been formally quieted, where judgment rendered had effect of quieting title in proper manner.

9. Contracts ⇨170(1)

The parties to a contract which is uncertain in terms will be held to their own practical construction of the contract.

10. Waters and water courses ⇨156(2)

Where land sale contract which obligated vendor to deliver water for irrigation did not expressly require water to be piped from reservoir to corner of land sold, contract was construable as requiring only a pipe line 150 feet long which was installed and proved satisfactory for period of nine years, since parties themselves placed such a construction upon the contract.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action by R. A. Edwards and wife against Nancy McMahon Cheney and others, for declaratory relief and for damages because of failure to supply plaintiff with a specified amount of water, wherein Nancy McMahon Cheney filed a cross-complaint to quiet title to certain land and water rights and for other relief. Upon the death of Nancy McMahon Cheney, U. F. Lewis, as executor of the last will and testament of deceased, was substituted as a party. From an adverse judgment, the executor appeals.

Judgment modified, and, as modified, affirmed.

Wilson & Coughlin, of San Bernardino, for appellant.

Clay & Handy, of Los Angeles, for respondents.

MARKS, Justice.

Plaintiffs brought this action for declaratory relief and to recover damages against Nancy McMahon Cheney, G. O. Trauzettel,

and Georgia A. Trauzettel. Mrs. Cheney answered and filed a cross-complaint to quiet her title to certain land and water rights and for other relief. Judgment went in favor of plaintiffs for declaratory relief and against them on their cause of action for damages. Mrs. Cheney died. U. F. Lewis was appointed executor of her estate and was substituted in this action. He appeals from the judgment. Mr. and Mrs. Trauzettel have not appealed.

Mrs. Cheney was, during her lifetime, the owner of a considerable tract of land in Riverside county, which had appurtenant to it twenty-four hours full flow, every ten days, of the waters of the San Timoteo creek.

By an executory sales contract bearing date of March 4, 1926, she agreed to sell this property to G. O. Trauzettel. The sales contract contained certain exceptions and reservations not important here and was so drawn that Trauzettel could subdivide and sell the property.

Under date of March 4, 1926, G. O. Trauzettel and Georgia A. Trauzettel, his wife, entered into an executory sales contract for the sale of about ten acres of this property to plaintiffs. This contract contained the following:

"The parties of the first part (Mr. and Mrs. Trauzettel) agree to pipe and deliver water for the irrigation of said land at the southeast corner thereof to the amount of 50 miner's inches measured under a four inch pressure, for two days in each calendar month, to-wit, on the first and fifteenth days.

"When a mutual water company shall have been organized for the delivery of water to said premises, the parties of the first part agree to accept stock in such water company representing said water right, provided that said water and the whole thereof shall be used upon said lands and not elsewhere."

Under date of April 3, 1926, Mrs. Cheney and Mr. and Mrs. Trauzettel joined in a deed conveying the real property to plaintiffs, Mr. and Mrs. Edwards. Besides the land, the deed granted "water as per contract dated Jan. 4, 1926, entered into between G. O. Trauzettel and Georgia A. Trauzettel, and grantees herein and the provision therein for ownership of said water in a mutual water company to be hereafter organized."

By a mortgage dated April 28, 1926, Mr. and Mrs. Edwards mortgaged the proper-

ty to Mrs. Cheney to secure the payments of promissory notes in the sum of \$4,300. This amount was credited on the unpaid purchase price of the G. O. Trauzettel contract.

Under date of March 1, 1928, Mrs. Cheney conveyed the property described in her contract of March 4, 1926 (excepting the property deeded to plaintiffs), to G. O. Trauzettel and Georgia A. Trauzettel. This deed contained the following: "There is conveyed by this Deed also the 24th hours of the full flow of the San Timoteo Creek every ten days recurring, which water is appurtenant to said lands hereby conveyed, together with all other water, water rights, pipes, flumes and ditches thereunto belonging or in any wise appertaining."

Under date of March 1, 1928, G. O. Trauzettel and Georgia A. Trauzettel executed a deed of trust on the property to secure the payment of a promissory note in the principal sum of \$35,000. This deed of trust was foreclosed. The property, including the water right, was reconveyed to Mrs. Cheney by deed bearing date of March 27, 1934.

The controversy between the parties to this action arose over the question of the delivery of water under the deed from Mrs. Cheney and Mr. and Mrs. Trauzettel to plaintiffs, and the quantity to be delivered. Appellant contends that Mrs. Cheney signed this deed merely for the purpose of conveying title to the land to plaintiffs; that by the deed Mrs. Cheney did not convey any water right; that the agreement was simply that of Mr. and Mrs. Trauzettel to deliver water as provided in their contract with plaintiffs bearing date March 4, 1926; that Mrs. Cheney was not bound by this agreement; that the contract referred to in the deed which was dated January 4, 1926, did not exist, and was never executed; that the only contract between Mr. and Mrs. Trauzettel and plaintiffs was dated March 4, 1926; that this contract was not incorporated in the deed by reference because the deed referred to a contract dated January 4, 1926.

The trial court found as follows:

"I. That it is true that on or about the 3rd day of April, 1926, the plaintiffs did purchase of the defendants a certain ten acres of land situate in the County of Riverside, State of California, and plaintiffs did at said time purchase of the defendants,

the 24 hour flow of fifty miner's inches of water to be delivered by the defendants on the 1st and 15th day of each and every calendar month from and after the said 3rd day of April, 1926.

"II. That it is true that the purchase noted in Finding I of the said land and water is evidenced by written document in the form of a grant deed which provides, covenants and contracts that the defendants, jointly and severally, will deliver the said water at the time and in the quantity in Finding I found, and deliver the same to the land described in Finding I in and through a pipe line. * * *

"VII. That it is true that the cross-complainant Cheney is the owner of all the real property consisting of land described in the first cause of her cross-complaint;

"That the cross-defendants Edwards have no right, title or interest in the said land and do claim no right, title or interest in or to the said land.

"VIII. It is true that the plaintiffs claim and assert a right in the water described in the first count of the defendant Cheney's cross-complaint; that the said claim is not without right."

The judgment contains the following:

"It Is Ordered, Adjudged and Decreed * * * that Nancy McMahon Cheney, G. O. Trauzettel and Georgia A. Trauzettel, defendants herein, are jointly and severally bound to deliver to the southeast corner of the property described in said instrument, respectively, on the 1st and 15th day of each and every calendar month, water for irrigation purposes in a full flow of fifty (50) miner's inches for twenty-four (24) hours;

"That along and over the course of delivery, and extending to the southeast corner of the said property, the said water shall flow in a pipe line at such places as the water would be contaminated for irrigation purposes if allowed to flow in an open conduit;

"That the said Cheney and the said Trauzettels are jointly and severally bound to deliver the said water in a pipe line as herein just declared;

"That upon the formation of a mutual water company which may deliver water to the said property, and upon its accepting and being bound by all of the obligations herein declared to be imposed upon the said Cheney and the said Trauzettels, the

said parties shall be released from their herein noted obligation. * * *

"It is Further Ordered, Adjudged and Decreed that plaintiffs herein, R. A. Edwards and Evelyn P. Edwards, have no right, title or interest in and to the property described in the cross-complaint of the defendant Nancy McMahon Cheney except such interest as the said Edwards may have by reason of the defendants Cheney and Trauzettel's obligation herein declared to furnish water to the plaintiffs."

The first problem presented is the legal obligation created by the signature of Mrs. Cheney on the deed conveying the ten acres to plaintiffs and referring to the provisions of the contract of sale which provisions were concerned with delivery of water to the land.

[1, 2] It is well established in California that, where a deed refers to another instrument with a reference sufficiently certain to identify it, the other writing is regarded as incorporated in the deed as a part of it. *Cadwalder v. Nash*, 73 Cal. 43, 14 P. 385; *Danielson v. Sykes*, 157 Cal. 686, 109 P. 87, 28 L.R.A., N.S., 1024; *Anderson v. Trotter*, 213 Cal. 414, 2 P.2d 373. It follows that, if the deed signed by Mrs. Cheney sufficiently identified the conditional sales contract by reference to it, the provisions of the latter instrument regarding water were incorporated in the deed by reference as fully as though they had been copied into the deed. It follows, assuming a proper reference, that by signing the deed Mrs. Cheney became a primary party to the promise to furnish plaintiffs with the specified amount of water.

We must next consider the sufficiency of the reference in the deed to the conditional sales contract. The conditional sales contract was dated March 4, 1926. The deed referred to a contract dated January 4, 1926. It must be conceded that if the word "January," used in the deed, had been the word "March," which appeared in the contract, the reference would have been sufficient.

The evidence discloses that the conditional sales contract was prepared on January 4, 1926, and was given to R. A. Edwards on that day; that he left California and was gone for about two months; that on his return the word "January" was changed to "March" and the contract executed; that there was no other contract

executed and the contract in question was the one under which plaintiffs gained possession of and purchased the ten acres.

[3,4] It is fundamental that an interest in real property can only be conveyed by an instrument in writing; that, where an ambiguity in a deed does not exist, parol evidence is not admissible to supplement the description. It is also true that, where an ambiguity exists in a deed, parol evidence may be admitted to explain the ambiguity. *G. R. Holcomb Estate Co. v. Burke*, 4 Cal.2d 289, 48 P.2d 669.

[5,6] While, on the face of the conditional sales contract, there appeared the date, "March 4, 1926," on its back appeared the words, "Agreement. G. O. Trauzettel and Georgia A. Trauzettel with R. A. Edwards and Evelyn P. Edwards. Dated January 4, 1926." The conditional sales contract had two dates upon it, one of which was correctly referred to in the deed signed by Mrs. Cheney. It is our conclusion that this presented a sufficient ambiguity to permit the introduction of parol evidence to explain it. That being the case, and the parol evidence showing beyond question that the conditional sales contract from which we have quoted was the only such contract in existence and was the one to which the parties intended to refer in the deed signed by Mrs. Cheney, it follows that the terms of that contract concerning the water were incorporated in the deed and that Mrs. Cheney was bound by them.

The next question is the nature of the covenant to furnish water to plaintiffs' land. Counsel for the executor stoutly maintains that it is not a conveyance of water carrying with it an easement but at best a personal covenant to deliver water.

The contract of Mrs. Cheney is so factually similar to that involved in the case of *Henrici v. South Feather Land, etc., Co.*, 177 Cal. 442, 170 P. 1135, 1136, that we consider that case controlling here. The contract in the *Henrici* Case contained the following:

"Addenda. The South Feather Water & Union Mining Company hereby agrees to furnish water for irrigation on the lands described in the within agreement at the rate of ten cents per inch per day of twenty-four hours each, whenever water is flowing in its ditch adjacent to said lands, and said John Alfred Henrici or his assigns hereby

agree to pay for all water so furnished by said company for said purposes, said sum of ten cents per inch per day of twenty-four hours monthly on demand.

"Witness the hands and seals of said parties this ninth day of October, A. D. 1884."

[7] In the above case the water company agreed to furnish water to the *Henrici* property from a ditch. In the instant case Mrs. Cheney agreed to furnish the property of plaintiffs with water through a pipe. The difference between the two contracts is in detail only and not in substantial substance. In the *Henrici* Case it was held that the contract created a continuing obligation to furnish water and a specific right or interest in the portion of the distributing system mentioned. This is the precise situation created here and binds Mrs. Cheney and the portion of her property specifically described. See *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 93 P. 858, 15 L.R.A., N.S., 359; *Copeland v. Fairview Land & Water Co.*, 165 Cal. 148, 131 P. 119. This conclusion is properly reflected in the judgment of the trial court.

[8] The executor urges that the judgment must be reversed because the trial judge failed to quiet title to Mrs. Cheney's property in accordance with the prayer of her cross-complaint. It is true that there is no formal judgment quieting her title. It may be admitted that there should have been such a judgment. However, it was adjudged that plaintiffs had no interest in the Cheney property except that created by the obligation to furnish water to the Edwards property. Plaintiffs can assert no interest in any of the Cheney property except under the contract to furnish water. This has the effect of quieting her title against plaintiffs except as to the water to which they were entitled. It follows that Mrs. Cheney suffered no prejudice in the trial court's failure to formally quiet her title against plaintiffs.

The evidence shows that the water for the Edwards property was stored in a reservoir on the Cheney property; that it was conveyed in an open ditch to within 150 feet of the southeast corner of the Edwards property and from that point in a pipe to that corner. This method of conveying the water was adopted shortly after Mr. and Mrs. Edwards went into possession

of their property and was followed for about nine years, until 1935, without objection.

[9] While the contract obligates Mrs. Cheney "to pipe and deliver the water for the irrigation" of the Edwards land, it does not in so many words require that the pipe extend from the reservoir to the southeast corner of the Edwards property. A pipe line 150 feet long was installed and proved satisfactory for about nine years. For this length of time the parties to the contract put their practical construction upon it. As the contract concerning the length of the pipe is uncertain in its terms, the parties to that contract should be held to their own practical construction of it. *Skousen v. Herz*, 135 Cal.App. 116, 26 P.2d 498.

[10] Certainly there is nothing in the contract justifying the conclusion that Mrs. Cheney could be required to place sections of pipe at intervals along the ditch. Either it required pipe the entire way or only for the 150 feet which was constructed. As the parties by their own conduct have put the latter construction on the contract, the following portion of the judgment should be stricken therefrom: "That along and over the course of delivery, and extending to the southeast corner of the said property, the said water shall flow in a pipe line at such places as the water would be contaminated for irrigation purposes if allowed to flow in an open conduit."

This provision of the judgment is uncertain. The evidence shows that during several months in 1935, prior to the filing of the complaint on July 30th of that year, noxious weeds had been permitted to grow along certain portions of the banks of the ditch. It is evident that the trial court intended to require the construction of a pipe line along the portion of the ditch where the water would become contaminated by seeds from these weeds. Careful weed cutting in proper season would remove all danger of this contamination. The provisions of the quoted paragraph are prospective. They are too indefinite to be intelligently construed or properly enforced.

It is ordered that the judgment be modified by striking therefrom the paragraph just quoted, and as so modified is affirmed. Each party will pay his own costs of appeal.

We concur: BARNARD, P. J.; JENNINGS, J.

25 Cal.App.2d 123

MOUNTAIN MEADOW CREAMERIES et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 2141.

District Court of Appeal, Fourth District,
California.

Feb. 18, 1938.

1. Master and servant ☞20

The right of immediate discharge is an incident of the relationship of employer and employee, and points strongly to the existence of such a relationship.

2. Master and servant ☞5

In an independent contract, the parties may incorporate provisions tending to secure satisfactory results, and such provisions neither negative the relationship of independent contract nor point to the relationship of employer and employee.

3. Master and servant ☞5

Where distributor was placed in possession of milk route by producer, producer furnished distributor with merchandise to sell to customers, and contract provided for termination by either party upon notice, right of termination was not equivalent to right of an employer to discharge an employee, or right of an employee to quit his employment, which are incident to employer-employee relationship.

4. Master and servant ☞5

One who contracts with another is permitted to retain certain measures of control which would look to results to be obtained without assuming responsibilities that follow the relation of employer and employee.

5. Workmen's compensation ☞335

A distributor's contract with producer, whereby producer placed milk route in distributor's possession, distributor was to buy all supplies from producer, was to pay cash on delivery for products, was to have at least one delivery truck, distributor could perform contract himself or through his employees, and distributor was to carry public liability insurance and compensation insurance on his employees, and contract provided for termination by either party on notice, created relationship of "independent contractor" and not "employee," so that Industrial Accident Commission had no juris-

diction to make award for distributor's death.

[Ed. Note.—For other definitions of "Employee" and "Independent Contractor," see Words & Phrases.]

Original proceeding by the Mountain Meadow Creameries, a corporation, and others against the Industrial Accident Commission of the State of California and Edna R. Dodge to annul an award of the first-named defendant which gave to the last-named defendant, widow of George P. Dodge, deceased, compensation in the sum of \$5,150 for the death of deceased.

Award annulled.

F. Britton McConnell, of Los Angeles, for petitioners.

Stickney & Stickney, of San Diego, amici curiæ for petitioners.

Everett A. Corten, of San Francisco, for respondents.

MARKS, Justice.

This is an original proceeding in this court to annul an award of the Industrial Accident Commission which gave to Edna R. Dodge, widow of George P. Dodge, compensation in the sum of \$5,150 for the death of her husband.

The sole question presented is whether George P. Dodge, now deceased, was an employee of or an independent contractor with Mountain Meadow Creameries, a corporation. The solution of this question depends upon the construction to be placed on a contract between deceased and the corporation.

The Industrial Accident Commission held that the relationship created was that of employer and employee. Respondents seek to uphold this conclusion because of the provisions of the contract which they maintain gave the corporation the right of discharge of, and the right of control over, deceased. A proper solution of the problem requires a review of the more important provisions of the contract. As that instrument covers about twenty-eight printed pages of the record, it is obvious that we must content ourselves with a summary of its pertinent provisions.

The contract was dated December 12, 1936. It was executed by Mountain Meadow Creameries, called Producer, and George P. Dodge, called Distributor. It recited that the Producer was engaged in the production of dairy and poultry prod-

ucts and had built up a valuable business in San Diego wherein is the territory described in the contract. The Producer granted to the Distributor the sole and exclusive right to sell and dispose of its products in that territory, but reserved and retained "to itself the good will of all the present and future trade in said territory, and names, addresses and requirements of all present and future purchasers therein." During the life of the contract (one year and thereafter from year to year unless terminated), the Producer agreed not to retail any of its products within the territory, but reserved the right to wholesale its products therein. It agreed to turn over to the Distributor all orders received by it for retail sales within the territory.

The Distributor agreed not to solicit, sell, or deliver any products outside of the district nor to handle any competing products. Violation of this clause was ground for immediate cancellation of the contract and the assessment of a penalty on the Distributor.

The Distributor was required to furnish to the Producer lists of customers, and on termination of the contract an adjustment of the value of the route was to be made on the basis of \$1 credit to the Distributor for each new customer which he had secured and a like debit for each customer furnished by the Producer at the date of the contract.

The Producer was given the right to change the boundaries of the delivery district, with compensation to be paid to the Distributor if a reduction of the number of customers should be caused by the change in boundaries. In case the Distributor suffered a 10 per cent. shrinkage in business, the Producer had the right to reduce the size of the territory served by the Distributor, or to terminate the contract on two days' notice.

Provision was made for the purchase by the Distributor from the Producer of the products to be delivered to customers. An elaborate plan was set forth for determining the prices the Distributor was to pay for the products he purchased. He was required to pay cash on delivery for products. The giving of two insufficient funds checks for bills would furnish grounds for cancellation of the contract.

It was estimated that 250 customers were turned over to the Distributor at the date of the contract. It was provided that, if the number of unit sales should decrease

below that average figure over a thirty-day period, the Producer might terminate the contract.

The Producer was permitted to fix or change the location of the depot at which the Distributor could obtain his products. A scheme was worked out to compensate for special deliveries and for return of unsold products by the Distributor. Route books were to remain open for inspection by the Producer. The Producer required the Distributor to make reports of the condition of the route. Contents of the route books were to be considered confidential.

The Distributor was required to purchase and maintain an automobile delivery truck of make and body design approved by the Producer. It was to be kept in good repair by the Distributor and was to be painted once a year with appropriate lettering on it. He might purchase the truck from the Producer. In the event he did so, he was required to execute a chattel mortgage for the unpaid purchase price, if any, which should also be security for performance of the contract.

The Distributor and his employees were required to keep neat and clean and to wear clean white uniforms while on duty. They were required to be courteous and efficient in the performance of their duties. The Distributor could either perform under the contract himself or through employees who were not to be employees of the Producer. The Distributor was required to carry public liability insurance and insurance on his employees under the Workmen's Compensation Act.

The contract also contained the following provisions:

"While it is not the intention of either party hereto to terminate this agreement before its expiration, it is the desire of both parties that either of them shall have the privilege of terminating the same; therefore this contract may be terminated by Producer by giving to Distributor a two weeks' written notice thereof; and except as herein provided, (no termination during the first 120 days) Distributor may terminate this agreement at any time by giving Producer four weeks written notice hereof. * * *

"It is understood that the business developed by Distributor in the territory covered by this contract may be handled and served by him only, so long as this contract shall remain in force and effect. At no time shall Distributor have any right

to sell, assign, transfer or dispose of such business to any other person. * * *

"It is further understood and agreed that this contract shall in nowise be construed to create any co-partnership between the parties hereto nor the relationship of principal and agent. * * *

An elaborate scheme for mutual compensation was worked out in case of a forfeiture or termination of the contract within the first year.

When we take the contract by its four corners and construe it as a whole, the conclusion is inescapable that the Mountain Meadow Creameries placed a milk route in the possession of Dodge; that Dodge was required to purchase his supplies from the corporation and deliver them to the consumers within the district allotted to him. The corporation occupied the position of a wholesaler who furnished Dodge, a retailer, with an initial list of customers and sold him merchandise at wholesale prices. Dodge, the retailer, delivered these supplies to the customers and collected the retail prices from them.

Respondents urge that the contract gave the Producer the right to terminate it for various reasons, which are specified, and the absolute right to terminate it upon two weeks' written notice, which, it is argued, was equal to the right of discharge of an employee by an employer.

[1,2] It must be conceded that the right of immediate discharge is an incident of the relationship of employer and employee and points strongly to the existence of such a relationship. *Press Publishing Co. v. Ind. Acc. Comm.*, 190 Cal. 114, 210 P. 820. However, we do not construe these provisions of the contract as equivalent to the right of discharge possessed by an employer. Except in the case of the termination of the contract by the Producer on two weeks' notice, the right of termination existed only after some breach of the provisions of the contract by the Distributor. It is clear that the right of termination under these clauses was for cause and was intended to secure satisfactory performance by the Distributor. This looks to the results to be obtained, namely, good service. In an independent contract the parties may incorporate provisions tending to secure satisfactory results. Such provisions neither negative the relationship of independent contract nor point to the relationship of employer and employee.

[3] It is true that the contract provided for its termination by either party on notice. If we assume that it could be so terminated without cause, still these provisions negative the idea that they are equivalent to the right of discharge possessed by an employer. In case this right of termination was exercised by either party, an elaborate plan for compensation by one to the other was set forth. This would indicate the recognition of a property right in the milk route by each one of the parties; on the part of the Producer in the list of customers it had at the time of the execution of the contract; and on the part of the Distributor in those customers obtained by him. This is inconsistent with the relationship of employer and employee. This right of termination is not equivalent to the right of an employer to discharge an employee, or the right of an employee to quit his employment.

[4] Respondents further urge that the contract gave to the Producer such control over the Distributor that the finding of the existence of the relationship of employer and employee must be sustained. We find nothing in the contract giving to the Producer such complete or unqualified control over the Distributor as to indicate the relation of employer and employee. On the other hand, the limited control given to the Distributor indicates a desire to obtain satisfactory results under the contract instead of an intention to give to the Producer that detailed right of control over the actions of the Distributor which is an incident of the relationship of employer and employee. One who contracts with another is permitted to retain certain measures of control which would look to the results to be obtained without assuming the responsibilities that follow the relation of employer and employee. In *Moody v. Ind. Acc. Comm.*, 204 Cal. 668, 269 P. 542, 543, 60 A.L.R. 299, it is said:

"Section 8 (b) of the Compensation Act, above referred to, provides that: 'Any person rendering service for another, other than as an independent contractor, or as expressly excluded herein, is presumed to be an employee within the meaning of this act.' Many definitions of an 'independent contractor' have been made, but they are not essentially different. *Franklin Coal Co. v. Industrial Comm.*, 296 Ill. 329, 334, 129 N.E. 811. The following definition may be regarded as a correct statement of what constitutes an independ-

ent contractor: One who renders service in the course of an independent employment or occupation, following his employer's desires only in the results of the work, and not the means whereby it is to be accomplished. *Brown v. Industrial Acc. Comm.*, 174 Cal. 457, 460, 163 P. 664; *Green v. Soule*, 145 Cal. 96, 99, 78 P. 337; *Barton v. Studebaker Corp.*, 46 Cal.App. 707, 189 P. 1025; *North Bend Lumber Co. v. Chicago, etc., R. R. Co.*, 76 Wash. 232, 242, 135 P. 1017. 'It is well settled that, where one person is performing work in which another is beneficially interested, the latter may exercise over the former a certain measure of control for a definite and restricted purpose, without incurring the responsibilities, or acquiring the immunities of a master, with respect to the person controlled.' *Western Indemnity Co. v. Pillsbury*, 172 Cal. 807, 811, 159 P. 721. The decisive test of the relationship is: Who has the right to direct what shall be done, and when and how it shall be done? Who has the right to general control? *Lassen v. Stamford Transit Co.*, 102 Conn. 76, 128 A. 117, 118; see, also, *Fidelity & Casualty Co. v. Industrial Acc. Comm.*, 191 Cal. 404, 407, 216 P. 578, 43 A.L.R. 1304. In other words, the test of what constitutes independent service lies in the control exercised. The test of control means complete control, and we must carefully distinguish between authoritative control and mere suggestion as to detail. *Western Indemnity Co. v. Pillsbury*, supra.

We need cite only a few of the instances in which the Distributor had complete freedom of choice in the performance of the contract in order to demonstrate his freedom from that complete, unqualified, or authoritative control necessary to constitute him an employee. Within the limits of satisfactory service, he could choose his own time for deliveries and the route to be followed in making deliveries. He could deliver in person or hire others to deliver for him. He could operate one or more trucks. He was required to furnish one truck and pay its operating and maintenance expense. The amount of his compensation depended on his industry in keeping old customers and securing new ones. He was required to buy all products from the Producer and to pay cash on delivery for them. The bills owed by customers were his and he took the risk of making collections. Any losses from bad bills were his. The Distributor, not the Producer, sold the products to the cus-

tomers. There was no limitation on the credit to be extended to the customers. These are but some of the provisions of the contract that are entirely inconsistent with the relationship of employer and employee and which entirely negative the existence of that complete, unqualified, or authoritative control necessary to establish that relationship.

In legal effect the contract here involved cannot be distinguished from those before the courts in the cases of *Bohanon v. James McClatchy Publishing Co.*, 16 Cal.App.2d 188, 60 P.2d 510; *Rathbun v. Payne*, Cal.App., 68 P.2d 291, and *Batt v. San Diego Sun Publishing Co.*, Cal. App., 69 P.2d 216. In each of these cases it was held that the contracts created the relationship of independent contractor and not of employer and employee, or master and servant.

[5] Every contention made by respondents here was made in the three cases just cited. They were considered at length, answered, and resolved against respondents. To consider these contentions again in detail could serve no useful purpose. Under the provisions of the contract, measured by the authorities we have cited, the conclusion is inevitable that Dodge was neither the servant nor the employee of the Mountain Meadow Creameries, but an independent contractor. It follows that the Industrial Accident Commission had no jurisdiction to make the award in question here.

The award is annulled.

I concur: BARNARD, P. J.



25 Cal.App.2d 176

**GOLDEN STATE CO., Limited, et al. v.
SUPERIOR COURT IN AND FOR
LOS ANGELES COUNTY.**

Civ. 11737.

District Court of Appeal, Second District,
Division 2, California.

Feb. 24, 1938.

1. Discovery ☞49

The intention of the Legislature in enacting statute providing that testimony of

a witness who "is" an officer, member, agent, or employee of a corporation, which is a party to the action, may be taken by deposition, was to afford parties to litigation means of obtaining in advance of trial information concerning the issues so that they might properly prepare for trial and avoid being taken by surprise by unexpected contentions. Code Civ.Proc. § 2021, subd. 1, as amended by St.1935, p. 394.

2. Discovery ☞49

Under statute permitting testimony of a witness who is an officer or employee of a corporation, which "is" a party to the action, to be taken by deposition, former manager of corporation whose trustee in bankruptcy brought suit for breach of an alleged oral agreement to assist corporation in case of a strike and who was manager of corporation during time covered by litigation was required to give a deposition, as against contention that statute, which used present tense, applied only to officers of corporation at time deposition was sought. Code Civ. Proc. § 2021, subd. 1, as amended by St.1935, p. 394; Bankr.Act § 77B, 11 U.S.C.A. § 207.

Petition by the Golden State Company, Limited, and another for a writ of mandate commanding the Superior Court of the State of California, in and for the County of Los Angeles, to order John H. Chamness to give his deposition.

Peremptory writ ordered to be issued.

Pillsbury, Madison & Sutro, of San Francisco, and Benj. S. Parks, of Los Angeles, for petitioner Golden State Co., Limited.

Gibson, Dunn & Crutcher, and Norman S. Sterry, all of Los Angeles (H. F. Prince, of Los Angeles, of counsel), for petitioner Arden Farms, Inc.

Hyman Goldman, of Los Angeles, for respondent.

WOOD, Justice.

Petitioners have applied for a writ of mandate commanding respondent superior court to order John H. Chamness to give his deposition.

Richmaid Creameries, Incorporated, were engaged in the business of processing milk and distributing butter and cheese on and prior to August 1, 1936. At that time a strike was threatened by the employees of Richmaid Creameries and, according to the

allegations of the complaint hereinafter referred to, an agreement was made by Richmaid Creameries and the petitioners herein whereby it was agreed that if Richmaid Creameries would not accede to the demands of the "Union" the petitioners would refrain from soliciting or servicing any of the customers of Richmaid Creameries and would do certain things to assist Richmaid Creameries in conducting its business. Thereafter a strike was called against Richmaid Creameries. John H. Chamness was the manager of Richmaid Creameries, and, as such, conducted the negotiations which resulted in the making of the agreement with the petitioners. Richmaid Creameries, on September 6, 1936, filed a petition in the United States District Court for relief under section 77B of the Bankruptcy Act, 11 U.S.C.A. § 207. An order was made by the court directing the liquidation of Richmaid Creameries, and Chamness was appointed temporary trustee. On January 22, 1937, at a meeting of the creditors, L. Boteler was elected the trustee in bankruptcy.

An action was commenced in the superior court by L. Boteler as trustee of Richmaid Creameries against the petitioners herein on August 3, 1937, in which a large sum is sought to be recovered against the petitioners for damages for the breach of the alleged agreement concerning the threatened strike. The complaint bears verification under date of July 23, 1937, by John H. Chamness in which he stated that "he was the managing officer of the Richmaid Creameries, Inc., of whose estate the plaintiff herein is Trustee in Bankruptcy; that the facts alleged in the herein complaint are within the knowledge of affiant having occurred while affiant was said managing officer and therefore makes this affidavit in place of plaintiff herein."

The petitioners herein, defendants in the action commenced by L. Boteler as trustee in bankruptcy, filed answers and sought to take the deposition of Chamness. The parties to the action stipulated that the deposition might be taken but upon the refusal of Chamness to voluntarily appear an affidavit was filed on behalf of the petitioners in the superior court and a subpoena was issued directing Chamness to appear before a notary public to give his deposition. Chamness appeared before the notary but refused to give his deposition on the ground that at the time of the filing of the complaint and ever since he had not been an officer or manager of

Richmaid Creameries. Thereupon the petitioners sought an order from the superior court directing Chamness to give his deposition, but the superior court refused to make such order.

[1, 2] It is provided in section 2021, subdivision 1, of the Code of Civil Procedure, as amended by St.1935, p. 394, that the testimony of a witness may be taken by deposition "when the witness is a party to the action or proceeding or an officer, member, agent, or employee of a corporation." It is the contention of the respondent that since the wording of the statute is in the present tense, the witness, being no longer manager of the corporation, cannot be compelled to give his deposition. To pass upon this contention we should consider the purposes for which the statute was enacted. It was undoubtedly the intention of the Legislature to afford the parties to the litigation means of obtaining in advance of the trial information concerning the issues so that they might properly prepare for trial and avoid being taken by surprise by unexpected contentions. The purposes of the enactment would be defeated if a corporation litigant should be permitted to remove its officers or employees during the pendency of litigation and thus enable them to refuse to give depositions. In some situations such action would give an undue advantage to a corporation, especially if an individual were the opposing litigant. It has been held that an officer of a corporation may not resign or be removed for the purpose of preventing service upon such officer of process directed against the corporation. *Inventions Corp. v. Hobbs*, 2 Cir., 244 F. 430; *Evarts v. Killingworth Manufacturing Co.*, 20 Conn. 447. In *Zellerbach v. Superior Court*, 3 Cal.App.2d 49, 39 P.2d 252, 253, it is stated that "the Code sections relating to the taking of depositions should be liberally construed," citing *Pollak v. Superior Court*, 197 Cal. 389, 393, 240 P. 1006.

The unusual facts of the present litigation give especial force to the petitioners' application. The cause of action alleged by Richmaid Creameries arose from an uncommon situation. The oral agreement negotiated by Chamness on behalf of Richmaid Creameries with a number of defendants was novel and difficult of execution. Manifestly, if the defendants in the action commenced on behalf of Richmaid Creameries are to receive the benefits of the sec-

tion of the Code in question they can do so only by taking the deposition of Chamness. He was in charge of the affairs of the corporation during all of the time covered by the litigation and remained in charge for a period after the commencement of the bankruptcy proceedings. After the appointment of the permanent trustee he was considered the proper party to verify the complaint. It is apparent that the Legislature intended to provide for the taking of a deposition in a situation such as is here presented. To hold otherwise would be to deny to the petitioners a privilege which is accorded to others.

It is ordered that the peremptory writ issue.

I concur: CRAIL, P. J.

McCOMB, Justice (concurring).

I concur in the conclusion of the majority of the court. However, it is with considerable reluctance that I am unable to agree with the reasoning of my learned associates. Section 2021, subdivision 1, of the Code of Civil Procedure, provides in part that the testimony of a witness may be taken by deposition "when the witness is * * * an officer, member, agent, or employee of a corporation."

As I read the majority opinion, it leads to one of two inevitable results: Either the court is (a) holding that "is" means "was" or (b) inserting in the statute the word "was," so as to make the section in question read, "when the witness is or was * * * an officer, member, agent, or employee of a corporation * * *" his deposition may be taken.

The third person, singular, present indicative of the verb "be" is "is," while the first and third person singular, past tense of the verb "be" is "was." The Legislature has clearly used the present tense and not the past tense. Since at the time witness Chamness' deposition was taken, he was not an officer, member, agent, or employee of defendant corporation, he does not come within the purview of the statute as adopted by the Legislature. Hence, I cannot agree that subdivision 1 of section 2021, Code of Civil Procedure, is applicable to the situation here presented.

Inventions Corp. v. Hobbs, 2 Cir., 244 F. 430, and *Evarts v. Killingworth Manufacturing Co.*, 20 Conn. 447, are contrary to the law in this state as announced in *Security Investors' Realty Co. v. Superior Court*, 101 Cal.App. 450, 281 P. 709.

Taking the other alternative, we find that under a well-established rule of law the court may not add or supply words to a statute, unless necessary to give effect to the clear intent of the Legislature in its enactment, which rule is aptly stated by Mr. Justice Houser in *Re Estate of Garthwaite*, 131 Cal.App. 321, 324, 21 P.2d 465, 467, thus: "Equally as strong and imperative is the rule of law which in effect denies to courts authority in anywise to add to, or to supply, words to a statute 'except for the most cogent reasons.'" (Citing authorities.)

In *Re Estate of Barnett*, 97 Cal.App. 138, 142, 275 P. 453, 455, Mr. Justice Nourse says: "We may not, therefore, under the guise of interpretation, read into a statute matters which have been omitted by the legislature particularly where it appears that the omission might have been intentional."

The Legislature has clearly expressed its intent by using "is" and not "was" in subdivision 1, section 2021, Code of Civil Procedure.

However, I believe the court's conclusion may be supported on two grounds:

First: In the present case the record discloses that Mr. Chamness, the witness, recognized the validity of the subpoena, attended at the time and place appointed for the taking of his deposition, was sworn, and submitted himself to examination as a witness without objection. As a result he thereby waived any objections which he might have to the taking of his deposition. This rule on a similar state of facts was announced in *Scott v. Shields*, 8 Cal.App. 12, 96 P. 385. At page 15 of 8 Cal.App., 96 P. 385, 387, Mr. Justice Burnett says: "Another answer to the contention of respondent obviously is that the witness recognized the validity of the subpoena, attended at the time and place appointed, was sworn, and submitted himself to examination as a witness without objection, and he thereby waived any defect or irregularity in the issuance of said subpoena. A subpoena 'is the process by which the attendance of a witness is required. It is a writ or order directed to a person and requiring his attendance at a particular time and place to testify as a witness.' Code Civ.Proc., § 1985. The subpoena in the present instance was regular on its face, was issued out of a court of general jurisdiction, and it accomplished its purpose in producing the attendance of the witness; and, conced-

ing that the witness could have refused to be sworn or answer questions, on the ground that he was present without authority of law, it should not require citation of authorities to maintain the position that he cannot now, for the first time, make the said objection to justify the action of respondent in declining to direct him to complete his deposition."

Second: I believe the correct rule of law to be that, where parties to litigation stipulate to the taking of the deposition of a witness, even though he does not fall within the cases enumerated in section 2021 of the Code of Civil Procedure, the witness has no right to object to his testimony being taken, so long as it is material to any issue in the pending litigation. This view conforms to that of the courts of New York and Colorado. In *McCullough v. Auditore*, 215 App.Div. 89, 212 N.Y.S. 628, 629, the rule is thus stated: "The claim of the witness is that there was nothing in the notice of subpoena, or before the court, showing any right in the plaintiff to take his deposition; i. e., that the witness was about to leave the state or resided more than 100 miles from place of trial or was sick or that 'other special circumstances' rendered it proper. See section 288, Civil Practice Act. But this is no concern of the witness. *The parties by consent could take the testimony of any witness, although none of the stated grounds existed.* The plaintiff followed the manner prescribed by section 290, and, as defendant did not move to vacate the notice, she must be deemed to have acquiesced in or consented to the taking of the deposition. The witness therefore should have appeared and submitted to the examination." (Italics mine.)

In *People v. District Court*, 66 Colo. 424, 182 P. 11, the rule is thus stated: "The notice and affidavit in section 376 are for the benefit and protection of the opposite party, and the stipulation made them unnecessary. The witness cannot object when the parties cannot. In *re Garvey*, 33 App.Div. 134, 53 N.Y.S. 476.

"It is argued that the statute must be strictly followed, because there were no depositions at common law (in this connection, however, see Code 1908, § 477) and, since the statute does not mention stipulations, that the proceeding by stipulation is unlawful; but, in view of the fact that depositions on stipulation are much more common than by any other method, and are

firmly imbedded in our practice, we cannot say that such method is invalid, but must say that it is valid and proper, and that a subpoena by a notary acting under stipulation is as good as if under an affidavit and notice."

International Coal Mining Co. v. Pennsylvania R. R. Co., 214 Pa. 469, 63 A. 880, announces a contrary rule which is based, however, on a strict adherence to the common law and not upon a Code of Civil Procedure, such as is in effect in New York and California.

In the present case the parties to the action stipulated to the taking of witness Chamness' deposition. He, therefore, was not in a position, as I view the law, to refuse to testify.

There is no merit in the argument that the adoption of the foregoing rule would permit a witness to be unduly harassed, in view of the rule which obtains in this state that, before witness may be punished for contempt for failure to give his deposition, he must be cited before the superior court and after a due examination by the judge as to the relevancy, materiality and competency of his testimony, ordered to answer the questions propounded to him. *Merrill v. Superior Court*, 33 Cal.App. 55, 164 P. 340.



25 Cal.App.2d 157
CHIARELLO v. AXELSON.
Civ. 11688.

District Court of Appeal, Second District,
Division 2, California.
Feb. 24, 1938.

1. Principal and agent ☞29½

Under contract granting to defendant exclusive rights to sell medicated cream and providing that plaintiff or defendant could assign contract to corporation to be formed by him and that party assigning should be relieved of further liability under contract, assignment of contract by defendant to corporation formed by him and acceptance of liability by corporation discharged defendant of any further liability under contract, even though plaintiff did not consent to substitution of corporation as a debtor.

2. Principal and agent Ⓒ29½

Plaintiff, who agreed that defendant could assign to corporation formed by him contract granting exclusive rights to sell medicated cream and that defendant should be relieved of any further liability under contract, could not hold defendant liable under contract on ground that corporation to which defendant assigned contract was insolvent where there was no finding that corporation was insolvent, and there was substantial evidence that corporation was not insolvent.

3. Evidence Ⓒ461(1)

A clause in contract granting exclusive rights to sell medicated cream providing that either party could assign contract to corporation formed by him, and that party assigning should be relieved of any further liability under contract was not ambiguous, and trial court did not err in excluding oral testimony to prove parties' true intention in action on contract.

4. Corporations Ⓒ1

Bad faith in some form must be shown before a court may disregard the fiction of separate corporate existence of several corporations.

5. Principal and agent Ⓒ29½

Plaintiff, who had agreed that defendant could assign to corporation "to be formed by him" contract granting exclusive rights to sell medicated cream and that defendant should be relieved of any further liability under contract, could not hold defendant liable under contract on ground that corporation to which he assigned contract was his mere alter ego, since defendant could not be charged with bad faith for forming corporation as agreed.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by Joseph Chiarello against J. C. Axelson to recover royalties due under a contract transferring to defendant exclusive sales rights of a medicated cream manufactured under a secret formula. From a judgment for defendant, plaintiff appeals.

Affirmed.

J. C. Gillham, of Los Angeles (H. Elliott Pownall, Jr., of Los Angeles, of counsel), for appellant.

Leslie S. Bowden and Frank Mergenthaler, both of Los Angeles, for respondent.

CRAIL, Presiding Justice.

The plaintiff was the owner of a trademark, to wit, "Lido," and the owner of a secret formula for the manufacture of medicated cream which he had been selling under the name "Lido Medicated Cream." The parties hereto entered into a written agreement which provided that the plaintiff transfer to the defendant the exclusive sales rights of "Lido Medicated Cream" and to the use of the trademark "Lido." Defendant agreed to purchase certain quantities of cream or pay to the plaintiff royalties amounting to \$200 per month.

The contract also contained the following provision: "Nineteenth: This agreement shall not be assigned in whole or in part, either directly or indirectly, by either party, without the written consent of the other party hereto in each case first had and obtained, except that either party hereto may assign this agreement to a corporation to be formed by him, and in the event of such assignment the party so assigning shall be relieved and discharged of any further liability under this agreement except as to any liability which had accrued prior to the date of any such assignment to such corporation. No such assignment shall be made to any such corporation unless such corporation assumes and agrees to be bound by the terms and conditions of this agreement."

At the time of entering into said contract the defendant was worth in excess of \$500,000.

Thereafter the defendant failed and refused to purchase the quantity of cream provided in the contract and failed to pay the minimum royalties. Thereupon the plaintiff sued the defendant in the municipal court and obtained judgment for the sum of \$200 per month up to the date of the filing of the suit.

Thereafter the defendant formed and organized a corporation under the laws of California known as "Lido Products Company" and he assigned said contract to said corporation. The corporation passed a resolution by the terms of which it assumed and agreed to be bound by the terms and conditions of the said agreement. Defendant so notified the plaintiff. The defendant tendered to the plain-

tiff all sums due up to the date of the transfer and the company tendered to the plaintiff \$200 for royalties due for the month of June, both of which the plaintiff refused. The defendant notified plaintiff that he had no further liability under the said agreement. Thereafter the plaintiff commenced this action against the defendant for the sum of \$200 per month down to the date of the commencement of the action. The defendant answered that he had formed the corporation as provided in paragraph 19 of the agreement and that he had transferred the contract to said corporation and that the corporation had assumed all the liabilities and that he was relieved from any further liability. Upon the issue thus formed the court rendered judgment for the defendant. It is from this judgment the plaintiff appeals.

[1] It is the first contention of the plaintiff that there cannot be a novation where a new debtor is substituted without the consent of the creditor to the substitution, and in the instant case it is shown that plaintiff refused to give his consent. He says, "The only theory upon which the judgment of the lower court can be sustained, was that under the provisions of said paragraph 19 appellant herein accepted the said Lido Products Company, a corporation, in the place and stead of Axelson at the time he entered into the original contract of June 17, 1933; in other words, it must be contended that he consented to the substitution and novation nearly two years before any novation was attempted to be made and without knowledge of what such a corporation might be, or of what its assets might consist!" This is literally what the plaintiff agreed to do in his contract. There is no merit in the contention that the corporation should be of equal financial standing as the defendant or that it should at least have assets amounting to \$50,000. The plaintiff had already agreed that "either party hereto may assign this agreement to a corporation to be formed by him, and in the event of

such assignment the party so assigning shall be relieved and discharged of any further liability under this agreement."

[2] The plaintiff next contends that the corporation was insolvent and that the assignment to an insolvent corporation did not release the defendant. There is no finding that the corporation was insolvent, and taking the evidence in the light most favorable to the defendant, there is substantial evidence the corporation was not insolvent.

[3] The plaintiff next contends that paragraph 19, above set forth was ambiguous and uncertain and that therefore the court erred in excluding oral testimony to prove the true intention of the parties. There is no ambiguity in said paragraph.

[4, 5] Finally the plaintiff contends that the acceptance of the obligation by the corporation does not actually release the defendant from his obligations under the agreement for the reason that the corporation was the mere alter ego of the defendant. The answer is that under the terms of the agreement the corporation was "to be formed by him." "Bad faith in one form or another must be shown before the court may disregard the fiction of separate corporate existence." *Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, Inc.*, 217 Cal. 124, 129, 17 P.2d 709, 711. The defendant cannot be charged with bad faith for doing the very thing agreed upon. In *Erkenbrecher v. Grant*, 187 Cal. 7, 11, 200 P. 641, 642, the court said, "Divested of the essentials which we have enumerated, the mere circumstance that all the capital stock of a corporation is owned or controlled by one or more persons does not, and should not, destroy its separate existence; were it otherwise, few private corporations could preserve their distinct identity, which would mean the complete destruction of the primary object of their organization."

Judgment affirmed.

We concur: WOOD, J.; McCOMB, J.

VOTAW v. FARMERS AUTOMOBILE INTER-INSURANCE EXCHANGE et al.*

Sac. 5143.

Supreme Court of California.

Feb. 24, 1938.

Rehearing Granted March 25, 1938.

1. Automobiles ⇨19

The statutory provision that "title" to automobile shall not be deemed to have passed or "transfer" thereof be deemed complete until certificates of registration and ownership are issued deals only with "title" and "transfer," and does not affect right of ownership or interest in automobile. St.1931, p. 2105, § 45¼.

2. Automobiles ⇨19

As quoted words are used in statutory provision that "title" to automobile shall not pass or "transfer" be complete until certificates of registration and ownership are issued, one may have "title" and not be owner, and one having naked title may "transfer" the property without ownership being affected, or equitable owner may convey his rights without any effect on legal title. St.1931, p. 2105, § 45¼.

3. Sales ⇨201(1)

Under statutory provision that goods sold are at the buyer's risk after delivery, equitable title to goods is in buyer. Civ. Code, § 1742, as added by St.1931, p. 2242.

4. Insurance ⇨332¼

Where automobile is sold under conditional sales contract, seller does not have "sole and unconditional ownership" required as condition of recovery on automobile liability policy, since buyer and seller each have mere qualified contingent interest. Civ. Code, § 1742, as added by St.1931, p. 2242; St.1931, p. 2105, § 45¼.

[Ed. Note.—For other definitions of "Sale and Unconditional Ownership," see Words & Phrases.]

5. Insurance ⇨332¼

A seller of automobiles who committed misdemeanor by failing to comply with statutes concerning registration of sale and delivery of certificate of ownership to purchaser could not rely on such failure as basis for contending that he retained "sole and unconditional ownership" so as to remain within coverage of automobile liability policy. St.1925, p. 414, § 153; St.1927, p. 1424, § 45½.

6. Insurance ⇨309

A violation of policy provision by which insurer's risk is not increased or rights are not substantially prejudiced is no defense to an action on automobile liability policy.

7. Insurance ⇨435

Where automobile was sold under conditional sales contract, though seller did not register sale or obtain issuance of certificates of registration and ownership, and seller was held liable for damages caused by buyer's negligent operation of automobile, liability insurer was liable under indorsement to seller's policy whereby coverage was extended to person in possession of automobile with the "permission of the named assured," irrespective of seller's lack of "sole and unconditional ownership" required by policy. St.1929, p. 514, § 45(e); St.1931, p. 2105, § 45¼; Civ.Code, § 1742, as added by St.1931, p. 2242.

[Ed. Note.—For other definitions of "Permission of Assured," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Amador County; A. Caminetti, Jr., Judge.

Action on an automobile liability policy by J. E. Votaw against the Farmers Automobile Inter-Insurance Exchange and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

Prior opinion, 65 P.2d 924.

James W. Hughes, of Los Angeles, for appellants.

Ralph McGee, of Jackson, J. Calvert Snyder, of Stockton, and Harold Raines, of Oakland, for respondent.

Lasher B. Gallagher, Finlayson, Bennett & Morrow, and Henry L. Knoop, all of Los Angeles, W. H. Stammer and Galen McKnight, both of Fresno, and Morgan J. Doyle and J. Joseph Sullivan, both of San Francisco, amici curiæ.

HOUSER, Justice.

The pertinent facts which relate to the instant appeal appear to be that, although plaintiff was the owner of an automobile which was insured by the defendants against so-called "public liability," by the terms of the contract or policy of the said insurance, the defendants were exempted from such liability if it should appear that the interest of plaintiff in the automobile

*For subsequent opinion see 85 P.2d 872.

"was at any time other than sole and unconditional ownership"; that thereafter, under the terms of an oral conditional sale contract, plaintiff sold the automobile to one Kin, who paid a portion of the purchase price, and to whom possession of the automobile was delivered; but that notwithstanding that fact, plaintiff expressly reserved title to the automobile in himself until after the full remainder of the purchase price thereof had been paid to him; that with reference to such sale, neither plaintiff nor Kin complied with the provisions of section 45 $\frac{3}{4}$ of the California Motor Vehicle Act as it then was in force, St. 1923, p. 517, as added by St. 1931, p. 2105, in that no certificate of ownership was delivered to Kin, nor was a certificate of ownership or a notice of sale given to the division of motor vehicles of this state; that at a time when, in such circumstances, the automobile was in the possession of Kin, arising from his alleged negligent operation of said automobile, an accident occurred, as a result of which a third person was injured, on account of which a judgment was rendered against both plaintiff and Kin; and that on appeal, that judgment was affirmed; as a result of which plaintiff was compelled to and did pay the amount therein adjudged against him. Thereupon, in reliance on the terms of the insurance policy to which reference hereinbefore has been had, plaintiff instituted the instant action against the defendants for the purpose of recovering the pecuniary loss which theretofore he had thus sustained. A judgment was rendered in favor of plaintiff, and the defendants have appealed therefrom.

On the date when the conditional sale contract which was entered into between plaintiff and Kin became effective, subdivision (e) of section 45 of the California Motor Vehicle Act, St. 1923, p. 525, as amended by St. 1929, p. 514, contained the following provision: "Until said division shall have issued said new certificate of registration and certificate of ownership as hereinbefore in subdivision (d) provided, delivery of such vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose."

It is with respect to, and by reason of the language of the statute to which reference just has been had, that respondent asserts

that the complete title to the automobile remained in the vendor.

From an examination of the several briefs that have been filed herein, it appears that ordinarily, a determination of the rights of the respective parties to a great extent would depend upon the effect which now is to be given to the reasoning which heretofore has been presented by this court in the leading case of *Wyman v. Security Ins. Co. of California*, 202 Cal. 743, 262 P. 329. For an understanding of the issue here under consideration, it is sufficient that attention be directed to that part of the syllabus of that case which contains not only a statement of the pertinent facts upon which the decision therein depended, but also the law which was applicable thereto, as follows: "Where the owner of personal property [an automobile truck] enters into a contract to sell it and gives the purchaser the possession thereof but retains the title to the property until final payment of the purchase price, the loss, in case of loss or destruction of the property, falls upon the vendor; and the latter is not precluded from recovering upon a policy of fire insurance [which contains a requirement of 'sole and unconditional' ownership of the truck in the vendor] by reason of the fact that he had entered into such an agreement prior to the issuance of the policy of insurance."

It is unquestioned that the decision thus rendered was supported in principle, not only by precedents of cases which theretofore had been adjudicated by the courts of this state, but as well by those of other jurisdictions. See, also, *Kelly v. Smith*, 218 Cal. 543, 24 P.2d 471, where many authorities are reviewed. Notwithstanding that fact, appellants contend that because of the provisions of section 1742 of the Civil Code, as amended since the decision in the *Wyman Case* was rendered, the reasoning upon which that decision was made dependable, no longer has application to a statement of facts such as here is presented. A part of the language of the statute, Civ. Code, § 1742, as added by St. 1931, p. 2242, to which appellants have referred is as follows: "Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery."

However, as is illustrated in each of several former adjudications in analogous cases, the conclusion that was reached in the Wyman Case does not conform to some earlier decisions which were rendered by this court. In the case of *McCullough v. Home Ins. Co.*, 155 Cal. 659, 102 P. 814, 815, 18 Ann.Cas. 862, it was held that a "conditional" vendee of real property was the "sole and unconditional owner" thereof within the terms of an insurance policy which provided that in order that it be binding upon the insurance company, the assured was required to be the "sole and unconditional" owner of the insured property. In part it was there said: "The clause of the policy providing that it shall be void if the insured's interest is other than sole and unconditional ownership, or the subject be a building on ground not owned by the insured in fee simple, is designed to remove from him the temptation to profit by the willful destruction of property not entirely owned by him. *Imperial Fire Ins. Co. v. Dunham*, 117 Pa. 460, 12 A. 668, 2 Am.St.Rep. 686. 'It therefore follows that the clause is in most cases held to refer to the character and quality of the title—to the actual and substantial ownership, rather than to the strictly legal title.' 2 *Cooley, Ins.*, 1369. An equitable title in the insured is a sufficient compliance with the condition in question. A vendee in possession of property under a valid contract of purchase which he is entitled to enforce specifically is the holder of such equitable title. *Id.* 1376. And the great weight of authority supports the proposition that such vendee is the 'sole and unconditional owner,' within the meaning of the policy, even though a portion of the purchase price may yet remain unpaid." To the same effect, in similar cases, see *Ramirez v. United Firemen's Ins. Co.*, 46 Cal.App. 451, 189 P. 309, and *Kavanaugh v. Franklin Fire Ins. Co.*, 185 Cal. 307, 197 P. 99. And in the case of *Savage v. Norwich U. F. Ins. Soc.*, 125 Cal.App. 330, 13 P.2d 955, the same rule was applied where the subject-matter of a fire insurance policy was personal property.

But it should be noted that the Wyman Case is supported by the case of *Cocores v. Assimopoulos*, 4 Cal.2d 82, 47 P.2d 699, which involved an issue similar to that here under consideration, and which was decided after the amendment to the original provisions of section 1742 became effective. However, for the reason that, as amended, the statute was not in force at the time

when the contract there under consideration was asserted to have been breached, it was held that the provisions of the statute as hereinbefore have been set forth, could not be made applicable to the facts in that case. But in addition to the authorities hereinbefore cited, which are to the effect that the vendee was the "sole and unconditional" owner of property which theretofore had been sold to him on a conditional sale contract, in the case of *Sharman v. Continental Ins. Co.*, 167 Cal. 117, 138 P. 708, 52 L.R.A.,N.S., 670, it was ruled that (syllabus), "One who has entered into, though not recorded, an agreement to convey property, received installments of the purchase price, and placed the vendee in possession, is not the sole and unconditional owner of the property within the meaning of a provision in a policy of insurance thereon that the policy shall be void 'if the interest of the assured be other than unconditional and sole ownership.'" To the same effect, see *Brickell v. Atlas A. Co.*, 10 Cal. App. 17, 101 P. 16.

[1,2] But with reference to the language that is contained in subdivision (e) of section 45 of the California Motor Vehicle Act, to which reference hereinbefore has been had, it should be noted that instead of containing any attempted restriction or limitation upon the right of ownership or interest in an automobile that has been the subject of sale and purchase by respective parties to an agreement, in that regard the only attempt to fix the status of either the seller or the buyer relates to matter of "title" and to "transfer." That is to say, that should the parties fail to comply with the statutory requirements, the "title" to the automobile should be deemed "not to have passed"; nor shall the "transfer" be deemed complete or valid for any purpose. It is apparent that one may have "title" to a thing and not be its owner; likewise, would it be possible for one who holds the naked title, to "transfer" the property to another without the ownership therein being at all affected. On the other hand, one who is the equitable owner of property may convey his rights therein without any effect being produced in the legal title thereof. For example, had one purchased an article of personal property, but had had it delivered into the possession of another to whom a bill of sale or other evidence of ownership had been given, there could be no doubt that the one who had furnished the money for such purchase at least would be the

equitable owner of such property. It therefore would seem not impossible that the language of the statute to which attention hereinbefore has been directed may affect the legal title, as distinguished from equitable ownership of or interest in an automobile. See *Sly v. American Ind. Co.*, 127 Cal.App. 202, 207, 15 P.2d 522; *Swing v. Lingo*, 129 Cal.App. 518, 19 P.2d 56; *Kenny v. Christianson*, 200 Cal. 419, 253 P. 715; *Pendell v. Thomas*, 95 Cal.App. 33, 272 P. 306; *Goodman v. Anglo-Cal. T. Co.*, 62 Cal. App. 702, 217 P. 1078. For note, with appropriate authorities with respect to the general situation, see 23 California Law Review, 562.

[3] But to reiterate the legal principle applicable to the situation only as here presented: By the *Wyman* Case, it was decided that "the loss falls upon the vendor"; whereas, by the provisions of section 1742, Civil Code, "the goods are at the buyer's risk." In other words, although by virtue of the decision in the cited case the title to the property remains in the seller, nevertheless, in accordance not only with the express terms of the statute as amended, but also as interpreted by other California cases hereinbefore cited, as well as by the courts of other jurisdictions, the equitable title to such property is in the buyer.

[4] In reaching a conclusion with regard to the binding force of a provision in an insurance contract like that here involved, especially in the absence of some qualifying agreement between or among the interested parties, the test that frequently has been applied has been related to a determination of the question upon whom the loss would fall. And without reference to the desirability of such a rule, in consideration of our statutory provision that "the goods are at the buyer's risk," it would seem conclusive that if such test be here applied, the necessary result will be not only that the vendee of the automobile had at least an equitable title therein, and that he held it at his risk, but also that the seller was not the "sole and unconditional" owner thereof, within the meaning of that phrase, as expressed in the policy of insurance which is here under consideration. Otherwise stated, if the case is determinable by a solution of the question: "Upon whom would the loss fall?" it becomes apparent that by the terms of the statute to the effect that the goods are at the buyer's risk, no answer is permissible other than that because the vendee must suffer the loss, necessarily the

vendor is not the "sole and unconditional" owner of the automobile.

Again, it may be noted that although the validity of the insurance policy is made to depend upon the provision which requires in the assured sole and unconditional ownership of the insured property, and consequently that the question of ownership of the assured in the subject-matter of the policy necessarily is involved in the determination of liability of the insurance company, nevertheless, neither in the *Wyman* Case nor in the language of the pertinent statute, is the question of ownership directly made a special subject of consideration. However, in the cited case, notwithstanding the requirement in the insurance policy regarding the necessity of sole and unconditional ownership in the vendor, together with the apparent fact that after a sale of the property had been made, the vendor no longer was the possessor of the equitable title thereto—from the ultimate conclusion therein expressed, to wit, "that * * * in case of the loss or destruction of the property involved, the loss falls upon the vendor," it becomes clear that the implied question of whether the vendor was the sole and unconditional owner of the property, was substantially answered to the effect that the ownership was in the vendor. But with respect to the pertinent terms of the statute, to wit, that "the goods are at the buyer's risk," in opposition to the ruling in the *Wyman* Case, the implication is that the vendee has acquired an interest in the property, with the result that the insurance contract or policy has been breached, in that at the time the loss was sustained, the vendor no longer was the sole and unconditional owner of the insured property.

It is obvious that upon the execution of a conditional sale agreement, followed by a delivery of the subject-matter of the contract to the vendee, neither of the parties to the agreement has an absolute ownership in the property, but that the ownership of each is subject to certain provisions or stipulations that are contained within the terms of the contract. Each of the parties has a qualified interest in the property which, on the one hand, as far as the vendee is concerned, contingent upon the happening of defeasance conditions, may be entirely lost to him, or, on the other, likewise contingently, may develop or ripen into his unqualified ownership therein. In other words, the absolute ownership is perfect in neither of the parties; nor may it become perfect in either of them except, as far as the vendee is

concerned, upon the happening or the performance by him of some specified act or acts; or in the vendor, except upon the failure on the part of the vendee to perform some designated act or acts.

[5] But in the instant case a separate reason exists for refusing recognition of plaintiff as the "sole and unconditional" owner of the automobile which he sold on a conditional sale contract. By the provisions of sections 45½ and 153 of the California Motor Vehicle Act then in force, St. 1923, pp. 517, 565, added by St. 1927, p. 1424, and amended by St. 1925, p. 414, a violation by plaintiff of other provisions of the statute relative to the registration of the sale of the automobile and a delivery of a certificate of ownership thereof to the purchaser, constituted a misdemeanor. Had plaintiff complied with the requirements of the statute with reference to such matters, it is probable that the necessity for his present contention that after the oral conditional sale contract had been entered into he remained the "sole and unconditional owner" of the automobile, would not have arisen. His assertion at this time, in effect that because he violated such statutory requirements he should be permitted to profit by such wrongdoing should not, in equity, be available to him.

The ruling in the case of *Schmidt v. C. I. T. Corporation*, 14 Cal.App.2d 92, 57 P.2d 1016, is in point. It was there held (syllabus): "Where the registered owner of a motor vehicle sells it and delivers to the vendee the certificate of ownership duly endorsed by him, and the vendee, without forwarding the certificate to the division of motor vehicles as required by subdivision (b) of section 45 of the Motor Vehicle Act, sells the car to a third person under a contract of conditional sale, and an action is subsequently brought for damages arising from the operation of the car by said third party, the vendee cannot take advantage of its own wrong in failing to comply with said subdivision (b), but must bear the burden of ownership under section 1714¼ of the Civil Code in the same manner as if it had complied with said subdivision upon its purchase of the car; and it is immaterial that said vendee was never the registered owner of said vehicle."

However, a final question of vital importance remains for consideration: Preceding the date on which the accident which gave rise to the question of the liability of the defendants occurred, the defendants wrote

a letter to plaintiff of which the following is a copy of the essential part of the body thereof, to wit:

"We are enclosing an endorsement form which you will please attach to your policy. It is for the purpose of broadening the terms of the same to meet present automobile driving conditions. This endorsement provides for the extension of insurance under your policy to others who may be driving your car (with your permission), and gives to them all the protection afforded you by your policy. It also provides for compliance with the Owner's Responsibility Laws of the various states in which the Exchange operates, or in which you may be traveling at the time of an accident involving your insured car. There will be no additional charge for the extension of this coverage. In granting the extension of this coverage the Governing Board of the Exchange is keeping to the policy of furnishing its members with adequate coverage to meet the various changes in laws and conditions affecting the driving of automobiles.

* * *

The "extension of the insurance," to which reference was made in that letter, was as follows:

"It is made a condition of the policy to which this endorsement is attached that, beginning at noon, standard time, January 1, 1933, at the address of the named insured stated herein, the insurance granted to the named insured under Part II relating to Property Damage and Public Liability and subject to all the terms, conditions and limitations of the policy, shall also inure to the benefit of any person or persons while riding in or legally operating the automobile described herein and to any person, firm or corporation legally responsible for the operation thereof, provided such use or operation is with the permission of the named Insured, or, if the named Insured is an individual with the permission of an adult member of the named Insured's household other than a chauffeur or domestic servant; provided that the insurance so granted and extended shall not be available to any public carrier, public automobile garage, automobile repair shop, automobile sales agency, automobile service station, or the agents or employees thereof while in the course of such agency or employment."

With reference to such "extended coverage," at the outset respondent directs attention to the "words" which occur therein, to wit, "broadening the terms," "extension

of insurance," "extension of coverage," "extended coverage," "omnibus clause," and "any person or persons."

[6] From the general tenor of the language contained in such letter, as well as from a consideration of such several phrases to which reference just has been had, respondent asserts that "beyond any doubt an intention on the part of appellants that the insurance provided by the endorsement shall be not restrictive but increased or more extensive than that provided in the body of the policy," is clearly indicated. In that connection, it first should be noted that in situations similar to that which is presented herein, the general trend of authority is to the effect that the violation of a provision in an insurance policy by which the risk of the insurer is not increased or its rights substantially prejudiced, does not constitute a valid defense to an action on the policy. *Hynding v. Home Acc. Ins. Co.*, 214 Cal. 743, 7 P.2d 999, 85 A.L.R. 13, and *Sly v. American Indemnity Co.*, 127 Cal. App. 202, 15 P.2d 522.

In the case of *Hynding v. Home Acc. Ins. Co.*, 214 Cal. 743, 752, 7 P.2d 999, 1002, 85 A.L.R. 13, it was said: "The violation of the condition by the assured cannot be a valid defense against the injured party unless in the particular case it appears that the insurance company was substantially prejudiced thereby." Citing cases. And in the case of *Sly v. American Indemnity Co.*, 127 Cal.App. 202, 208, 15 P.2d 522, 524, the identical thought is expressed. But as regards the instant case, although of great consequence, the question for determination is not so much whether the risk of the defendants in any manner was increased, or whether its rights were substantially prejudiced, but rather is, what construction fairly and reasonably may be placed upon the pertinent language of the contract of insurance, as modified (if at all) by the so-called "extended coverage"? And that question, or one analogous to it, has been definitely answered by at least one decision by an appellate tribunal of this state. We refer particularly to the case of *Sly v. American Indemnity Co.*, which was decided in the Fourth Appellate District, and is reported in 127 Cal.App. 202, 15 P.2d 522. In that case it appeared that under the terms of a conditional sale contract, one Krause had purchased an automobile. Thereafter he had some negotiations with one Mills, which related to a proposed transfer to him

of Krause's interest in the automobile, in consequence of which, possession of the automobile was delivered to Mills. In such circumstances, while the automobile was being operated by the latter, an accident occurred by which the plaintiff Sly was injured, by reason of which she thereafter recovered a judgment against Krause. On the return, unsatisfied, of a writ of execution on said judgment, the plaintiff in said action instituted an action against Krause's insurer. The contract of insurance therein, which resembled that in the instant case, contained a provision to the effect that the insurance company would be relieved from liability if thereafter it should appear that "the interest of the assured in the subject of this insurance be or become other than unconditional and sole lawful ownership." However, by the express terms of the policy of insurance, it was provided that the insurance of Krause was extended so that the coverage of liability became available to any person who, with Krause's permission, might operate the insured automobile.

Although a finding of fact that was made by the lower court to the effect that Krause had not transferred his interest to Mills was not disturbed on the appeal from the judgment, nevertheless the reviewing tribunal also declared not only that "under the circumstances" there was no "increase of risk" to the insurer by reason of Krause's "attempted transfer of interest in the automobile," but also that there could be no doubt that at the time when the accident occurred, Mills was operating the automobile with the permission of the assured. In part, the language which was used by the court was as follows: "In an action by such [third] person against the insurer violation by the assured of some condition in the policy is a valid defense only when it appears that by reason of such violation the insurer was substantially prejudiced. *Hynding v. Home Acc. Ins. Co.*, [214 Cal. 743], 7 P.2d 999 [85 A.L.R. 13]. In the present action the insurer was not prejudiced by the attempted transfer of interest in the automobile by the insured. It is true that possession of the automobile was transferred to Mills, who was operating the machine at the time respondent was injured. But it is expressly stated in the policy of insurance that insurance provided by the liability peril clause is so extended as to be available to any person lawfully operating the insured automobile provided such operation is with the permission of the assured named in the

policy. There can be no doubt that the operation of the automobile at the time respondent was injured was with the permission of the assured. It is therefore apparent that no increase in risk to appellant occurred by reason of the attempted transfer of interest in the automobile by its insured."

The case of *Firkins v. Zurich A. & L. Ins. Co.*, which was decided in the Third Appellate District, and reported in 111 Cal. App. 655, 295 P. 1051, provides another illustration of the same principle. That was an action based on a "public liability" indemnity policy of insurance, which contained a provision that the policy should not cover "in respect of any automobile, * * * while driven or manipulated by any person * * * under sixteen years of age in any event." However, an amendment or rider was attached to the policy, as follows:

"The policy to which this endorsement is attached is hereby extended to apply to any person * * * legally responsible for the operation thereof, provided such use or operation is with the permission of the named assured, or if the named assured is (an) individual, with the permission of an adult member of the named assured's household." Thus situated, the insurance company denied liability for damages which resulted from an accident which had occurred through the alleged negligent operation of the automobile by a fourteen year old son of the insured. In passing upon the question that was thus presented, in part, the court said:

"There appears to be no difficulty in reconciling the language of the policy with that of the rider on the subject of liability on account of the age of the chauffeur. It may be reasonably construed to mean that the surety company shall not be liable upon the policy 'while [the machine was] driven or manipulated by any person * * * under sixteen years of age' unless such minor was operating the car 'with the permission of an adult member of the named assured's household,' in which event the company is liable. To construe the language of this instrument otherwise would defeat the apparent intent of the parties and render the quoted language of the rider valueless." (An application for hearing of the cause by this court was denied.)

A nearly identical situation was presented in the case of *Swift v. Zurich A. & L. Ins. Co.*, which was decided in the First Appellate District, and reported in 112 Cal. App. 709, 297 P. 578. For all practical purposes here involved, the syllabus thereto contains a sufficient resume of both the facts and the law as therein decided: "A proviso in the body of an automobile indemnity insurance policy to the effect that the policy should not cover when the car was operated by one under sixteen years of age was superseded by a rider attached to the policy, where such rider was entitled 'Omnibus Coverage Endorsement' and provided that the coverage of the policy was extended to apply to any person or persons legally operating the car with the consent of the assured, and further provided in effect that it was a substitute for any inconsistent provision in the body of the policy." (A hearing was also denied by this court in that case.)

[7] On a comparison of the facts of the instant case with those which were present in each of the cases to which attention just has been directed, it is deemed sufficient to observe that, in principle, no substantial difference may be discovered. Irrespective of the conclusion herein reached with regard to whether plaintiff was the "sole and unconditional owner" of the automobile, in any event, in accordance with the terms of the conditional sale contract, his proposed vendee was in possession of the automobile "with the (implied) permission" of plaintiff and was operating it at the time when liability of the defendants attached. Without doing violence to the judgment of each of three separate Courts of Appeal of this state, in which respectively, as hereinbefore has been noted, in principle, it was decided that the special provision of the "extended coverage" indorsement on the policy of insurance superseded the general provision with respect to the limitation of liability unless at all times within the life of the policy the assured was the "sole and unconditional owner" of the automobile—this court is constrained to affirm the judgment that was rendered by the lower court.

The judgment is affirmed.

We concur: CURTIS, J.; LANGDON, J.; SHENK, J.; EDMONDS, J.

**COMMERCIAL CREDIT CO. v. BARNEY
MOTOR CO. et al.**

Sac. 5187.

Supreme Court of California.

Feb. 24, 1938.

Rehearing Denied March 25, 1938.

1. Sales ⇨467

Trust receipts given by retail automobile dealer to obtain advances from finance company to pay distributor for automobiles used for exhibition and sale are valid title retention documents. Civ.Code, §§ 3012 to 3016.16, as added by St.1935, p. 1930.

2. Estoppel ⇨76

Generally, title reserved by finance company which accepts trust receipt from retail automobile dealer and finances his payment to distributor for automobiles used for exhibition and sale is paramount, but finance company is estopped to claim title as against purchaser for value without notice of reserved title, who is led to believe that dealer has authority to dispose of title in usual course of trade. Civ.Code, §§ 3012 to 3016.16, as added by St.1935, p. 1930.

3. Estoppel ⇨76

Where bank had no actual knowledge that finance company financed retail dealer's purchase of automobile from distributor under trust receipt authorizing dealer only to sell for cash, to be paid over to finance company, accepted assignment of contract for conditional sale of automobile from dealer, and financed purchase of automobile by bona fide purchaser by paying dealer cash, which he failed to pay over to finance company, and accepting dealer's pledge of his personal credit, finance company was estopped to claim title to automobile as against bank, notwithstanding that bank knew of general use of trust receipts, had previously been asked by dealer if it intended to "floor" automobiles, and failed to ask dealer if particular automobile dealt with was "floored." Civ.Code, §§ 3012 to 3016.16, as added by St.1935, p. 1930.

An automobile is "floored" when it is financed under a trust receipt or similar title retention document, whereby retail dealer obtains possession of automobile from distributor for exhibition and sale through payment to distributor by finance company.

4. Principal and agent ⇨103(10)

The authority to sell for cash confers on an agent ostensible authority to negotiate a sale for cash or its equivalent.

5. Estoppel ⇨75

Under trust receipt giving retail automobile dealer, whose purchase from distributor was financed by finance company, power only to sell automobile for cash, to be paid over to finance company, dealer had ostensible authority, on assigning contract for conditional sale of automobile to bank which financed third party's purchase from dealer, to accept cash from bank, and, in addition, pledge his personal credit. Civ.Code, §§ 3012 to 3016.16, as added by St.1935, p. 1930.

6. Estoppel ⇨75

Under trust receipt authorizing retail automobile dealer, whose purchase of automobile from distributor was financed by finance company, only to sell automobile for cash, to be paid over to finance company, bank which paid price of automobile to dealer in cash, to finance third party's purchase from dealer, and received assignment of contract for conditional sale to third party, was not required to see that funds advanced by it to dealer were properly applied. Civ. Code, §§ 3012 to 3016.16, as added by St.1935, p. 1930.

In Bank.

Appeal from Superior Court, Merced County; H. S. Schaffer, Judge.

Action in claim and delivery by Commercial Credit Company against Barney Motor Company and others, wherein American Trust Company filed a third party claim. Judgment for third party claimant, and plaintiff appeals.

Affirmed.

Prior opinion, 71 P.2d 279.

Robert G. Partridge and Ralph E. Bancroft, both of San Francisco, for appellant.

John L. Rush and Gene G. Curry, both of Los Angeles, amici curiæ.

G. J. Irwin and Frank S. Barrett, both of San Francisco, amici curiæ in support of decision of Third District Court of Appeal.

D. Oliver Germino, of Los Banos, and Brobeck, Phleger & Harrison, of San Francisco (Moses Lasky and Gerald Beatty Wallace, both of San Francisco, of counsel), for respondent American Trust Co.

Louis Ferrari, of San Francisco, amicus curiæ.

SHENK, Justice.

The plaintiff sued Bernard Negra, doing business under the name of Barney Motor Company, and one Oscar Tonolla for possession of a Plymouth sedan automobile or its value, and for damages for the alleged wrongful detention thereof. American Trust Company filed a third party claim. The court made its findings of fact from which it concluded that title resided in the third party claimant, and rendered judgment accordingly. The plaintiff appealed.

On April 29, 1935, the plaintiff obtained title to the automobile from James W. McAllister Company, Inc., Chrysler distributor. Negra was a retail dealer of Chrysler and Plymouth automobiles at Los Banos. The Plymouth automobile in question was delivered to Negra under a trust receipt executed by him to the plaintiff, pursuant to which the latter retained title to the car. Negra agreed to hold the automobile in trust for the plaintiff and not to lend, mortgage, pledge, encumber, operate, demonstrate, or use it. He was, however, authorized upon consent of the plaintiff to sell the automobile for cash and deliver the proceeds to the plaintiff.

Oscar Tonolla was a brother-in-law of Negra and worked for him as a salesman. On May 7, 1935, Negra and Tonolla appeared at the office of the American Trust Company in Los Banos and applied for a loan on the sale of the car from Negra to Tonolla. A conditional sale contract was executed by Negra as seller and Tonolla as buyer, and was assigned by Negra to the bank. The bank advanced to Negra the purchase price of the car, and possession of the car was delivered to Tonolla. Negra, however, did not deliver the proceeds to the plaintiff. Registration of the automobile was effected with the division of motor vehicles showing Tonolla as the registered owner and the bank as legal owner thereof.

The bank's representative made no inquiries of Negra as to whether the automobile sold to Tonolla was "floored," that is, financed under a trust receipt or similar title retention document. There was testimony that the bank's officer was aware of the custom of "flooring" cars for retail dealers, but that he had no actual knowledge that this particular car was financed

and in fact owned by the plaintiff. It was also in evidence that Tonolla had no knowledge that Negra had taken the Plymouth automobile under a trust receipt or that Negra received any financial assistance with respect to the automobiles on his sales floor.

The court found that the sale of the car by Negra to Tonolla was made in good faith; and concluded that the plaintiff, who created the appearances by which Negra was enabled to sell the automobile to a bona fide purchaser, was estopped to assert its title as against the American Trust Company, which, as found by the court, was an innocent third party for value.

The disposition of the appeal must be deemed controlled by the familiar principles stated in such cases as *Tharp v. San Joaquin Valley Securities Company*, Cal.App., 66 P.2d 230, *Western States Acceptance Corp. v. Bank of Italy*, 104 Cal.App., 19, 285 P. 340, and *Pacific Finance Corp. v. Hendley*, 103 Cal.App. 335, 284 P. 736, 285 P. 1048.

[1] The method of financing dealers in the retail sales of automobiles under the so-called "trust receipt" has come into common practice. This method enables the retail dealer to obtain advances from a financing company to pay the purchase price to the distributor and at the same time receive possession of the automobile for the purpose of placing it on the sales-room floor for exhibition and sale to a prospective customer. Title is transferred directly from the distributor to the finance company which retains such title under the trust receipt until the amount advanced as the purchase price is repaid. The validity of such trust receipts as title retention documents has been established by the courts. Subsequent to the events hereinbefore related and in 1935, Stats.1935, p. 1930, the Legislature recognized the common practice and adopted the Uniform Trust Receipts Law, which comprises sections 3012 to 3016.16 of the Civil Code.

[2] However, the foregoing cited cases and others have applied the exception to the general rule that the reserved title of the entruster is paramount. The exception followed the provisions of section 1142 of the Civil Code in effect prior to 1931 and was based on the principle of estoppel. The title holder, having clothed the retail dealer with all the appearances

of ownership or authority to sell, could not be heard to assert title or ownership as against a purchaser for value without actual notice of the reserved title who had been led by appearances created by the true owner to believe that the dealer had authority to dispose of the title in the usual course of trade. Under such cases, the rights of the purchaser did not necessarily depend on the actual title or authority of the dealer, but were derived from the act of the real owner, which precluded him from disputing as against an innocent party, the existence of the title or power which, through negligence or mistaken confidence, he had caused or allowed to be vested in the party making the sale. *Rapp v. Fred W. Hauger Motors Co.*, 77 Cal.App. 417, 422, 246 P. 1067, and cases cited supra.

[3] No serious attack is made upon the findings and conclusion of the court that Tonolla was led to believe that Negra had the power of disposing of the automobile under a conditional sale contract. The attack is upon the finding and conclusion of the court that the bank was also entitled to rely upon an estoppel as against the plaintiff. The evidence affirmatively shows that the bank had no actual knowledge that the automobile in Negra's possession for sale was in fact owned by the plaintiff, or that Negra had received any financial assistance in "flooring" it. It is contended that the fact that the bank had knowledge of the practice of dealers to obtain the aid of finance companies to "floor" cars, and that some time before the transaction mentioned Negra had asked the bank if it planned to "floor" cars, was sufficient as a matter of law to put the bank on inquiry as to the title of the automobile sold to Tonolla and to preclude its reliance upon an estoppel to defeat the plaintiff's claim of title. A somewhat similar contention was made and rejected in *Fowles v. National Bank of California*, 167 Cal. 653, 140 P. 271. It was there decided that knowledge of the custom of depositing with a stockbroker certificates of stock indorsed in blank for purposes of sale was not sufficient to put a pledgee on notice to inquire concerning any possible restrictions on authority to pledge. The decisions in this state do not warrant a holding that mere knowledge of the general practice of "flooring" cars is sufficient to place on inquiry one about to part with

value. On the contrary, the cases herein cited support the conclusion that one in the position of the bank in this case who has parted with value without actual notice, or without knowledge of facts to put it on inquiry, is protected as against the claim of the intruder under a trust receipt. The decision in the case of *Henderson v. General Acceptance Corporation*, 209 Cal. 268, 286 P. 1014, does not indicate error in the court's conclusion on the facts in the present case. In the *Henderson* Case the appellant had knowledge of the unsatisfactory business conduct of the dealer, and had instigated some inquiry concerning the title, but with abundant facts to arouse its suspicions it stopped short of sufficient inquiry which would have disclosed the true state of the title. The record in that case, therefore, was sufficient to require affirmance of the judgment.

[4-6] We are satisfied on the present record that the trial court was justified in concluding that facts were not disclosed which would place the bank on inquiry as to the true state of the title, and that Negra's authority to sell for cash was not exceeded by the sale to Tonolla under conditional sale contract and the receipt by Negra of the full purchase price in cash from the bank. We have recently held that authority to sell for cash confers upon the agent ostensible authority to negotiate the sale for cash or its equivalent. *Twohey v. Realty Syndicate Co.*, 4 Cal. 2d 379, 382, 49 P.2d 819. That the full purchase price in cash was received by Negra upon the sale and delivery of possession of the automobile cannot be disputed. The fact that in addition to receiving the cash Negra pledged his personal credit upon the assignment to the bank of the conditional sale contract executed by Tonolla and himself is not necessarily inconsistent with the power vested in him by the plaintiff, and is at least within his ostensible authority. We do not have here a pledge of the personal property without change of possession, which was involved in *Pacific Finance Corp. v. Hendley*, 119 Cal.App. 697, 7 P.2d 391. Also in the absence of any fact or showing, and none appears, that there existed bad faith or collusion on the part of the bank in the sale, no duty devolved upon it to see to the proper application of the funds advanced by it and received

by Negra as the customer's purchase price of the car. *Purdy v. Bank of America N. T. & Sav. Assn.*, 2 Cal.2d 298, 40 P.2d 481.

Tonolla made no claim to the automobile, and the controversy for the possession thereof was between the plaintiff and the third party claimant. No error is shown in the court's conclusion that the third party claimant was the rightful owner and entitled to possession.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; EDMONDS, J.; HOUSER, J.



10 Cal.2d 628

In re MITCHELL'S ESTATE.

REEVE et al. v. PHILLIPS et al.

S. F. 15643.

Supreme Court of California.

March 9, 1938.

Appeal and error ⇐1194(2)

The construction of a will as entitling testatrix' husband to a certain parcel of land in fee simple as a portion of the residue, rather than a life estate therein, would not relieve parcel, or proceeds from any sale thereof, from burdens to which under the law the parcel might be subject as a portion of the residue.

In Bank.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

On petition for modification.

Petition denied.

For prior opinion, see 75 P.2d 1048.

Bohnett, Hill, Cottrell & Boccardo, of San Jose, for appellants.

Henry E. Monroe and Julia M. Easley, both of San Francisco, and L. F. Hobbs and Edward M. Fellows, both of San Jose, for respondents.

PER CURIAM.

The portion of the decision filed herein which affirms the judgment of the court to the effect that parcel 5 is distributable to John W. Mitchell in fee is not to be construed as relieving that parcel or the proceeds from any sale thereof from the burdens to which under the law the same may be subject as a portion of the residue. The intent in affirming the decree as to that parcel was to end the controversy concerning whether it was a portion of the residue, or was distributable to Mitchell for life. The question of who is entitled to the proceeds from the sale of said parcel should await the court's decision upon retrial.

The petition for modification is denied.



10 Cal.2d 758

STANDARD OIL CO. OF CALIFORNIA v.

JOHNSON, State Treasurer.

Sac. 5144, 5145.

Supreme Court of California.

Feb. 25, 1938

Rehearing Denied March 25, 1938.

1. Public lands ⇐2

The United States became vested with title to all lands within the territorial limits of California, not held in private ownership, by the Treaty of Guadalupe Hidalgo. Treaty of Guadalupe Hidalgo, Feb. 2, 1848, 9 Stat. 922.

2. Public lands ⇐1

The United States retained title to public lands within the territorial limits of California upon admission of California to statehood. Treaty of Guadalupe Hidalgo, Feb. 2, 1848, 9 Stat. 922; Act Cong. Sept. 9, 1850, 9 Stat. 452.

3. States ⇐14

The state of California was authorized to recede title by statute to territory incorporated in the Yosemite, Sequoia, and General Grant National Parks to the United States for park purposes, reserving the right to serve civil and criminal process therein, to tax persons and corporations, their fran-

chises and property therein, and to fix and collect license fees for fishing within the territory, and the United States was authorized to accept the territory upon the same terms. St.Cal.1919, p. 74; Act Cong. June 2, 1920, 41 Stat. 731; Const.U.S. art. 1, § 8, cl. 17; Const.Cal. art. 13, § 6.

4. Taxation ⇨20

Under statute receding title to territory incorporated in the Yosemite, Sequoia, and General Grant National Parks to the United States for park purposes, but reserving the right to tax persons and corporations, their franchises and property in the territory, and under congressional act accepting the grant upon the same terms, the state of California was authorized to tax in the areas designated in accordance with the power reserved. St.Cal.1919, p. 74; Act Cong. June 2, 1920, 41 Stat. 731; Const.U.S. art. 1, § 8, cl. 17; Const.Cal. art. 13, § 6.

5. Taxation ⇨31

The taxing power of the state is never presumed to have been relinquished unless the language in which the surrender is made is clear and unmistakable.

6. Taxation ⇨20

The power reserved to the state by a statute receding title to territory incorporated in certain national parks to the United States, but reserving the right to tax persons and corporations, their franchises and property, is to be construed most strongly in favor of the state. St.Cal.1919, p. 74; Act Cong. June 2, 1920, 41 Stat. 731.

7. Licenses ⇨15(1), 16(9)

The language employed in statutes imposing a tax upon retailers and distributors of gasoline will not be construed so as to disturb the classification of taxable subjects into classes of persons, property, and business. St.Cal.1923, pp. 571-577; St.Cal.1933, pp. 1632-1643; p. 2599, § 3; St.Cal.1935, p. 1252.

8. Licenses ⇨1

The sales and gasoline taxes are "excises" or "taxes on business" rather than "taxes on persons." St.Cal.1923, pp. 571-577; St.Cal.1933, pp. 1632-1643; p. 2599, § 3; St.Cal.1935, p. 1252.

[Ed. Note.—For other definitions of "Excise" and "Tax; Taxation," see Words & Phrases.]

9. Taxation ⇨20

Statute receding title to territory incorporated in certain national parks to the United States but reserving the right to tax persons and corporations, their franchises and property, in the territory, reserved to the state the general taxing power without exceptions other than those necessarily arising from ownership of the property by the United States, notwithstanding an express inclusion in the reserved power of the right to fix and collect license fees for fishing in the parks. St.Cal.1919, p. 74; Act Cong. June 2, 1920, 41 Stat. 731.

10. Licenses ⇨5

Under statute receding title to territory incorporated in the Yosemite, Sequoia, and General Grant National Parks to the United States for park purposes, but reserving the right to tax persons and corporations, their franchises and property in the territory, and under congressional act accepting the cession upon the same terms, the state of California was authorized to impose gasoline and sales taxes on private corporations based on sales within the territory, notwithstanding privilege of making sales allegedly emanated solely from the national government, and that taxes were excise taxes rather than taxes on persons or property. St.Cal.1919, p. 74; St.Cal.1923, pp. 571-577; St.Cal.1933, pp. 1632-1643; p. 2599, § 3; St.Cal.1935, p. 1252; Act Cong. June 2, 1920, 41 Stat. 731.

In Bank.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Actions by the Standard Oil Company of California against Charles G. Johnson, as Treasurer of the State of California, to recover gasoline taxes paid under protest. Judgments for defendant, and plaintiff appeals.

Affirmed.

Brobeck, Phleger & Harrison, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and W. H. Linney and James J. Arditto, Deputy Attys. Gen., for respondent.

PER CURIAM.

The appeals in several actions brought by the plaintiff, Standard Oil Company of California, involve the question whether sales of gasoline in certain national parks

are subject to the tax imposed by the Motor Vehicle Fuel License Tax Act. St.1923, pp. 571-577, as amended St.1933, pp. 1632-1643. These appeals have been consolidated for determination. A related question is presented in the companion case of Yosemite Park & Curry Co. v. Johnson, 76 P.2d 1191, wherein the Sales Tax Act, St.1933, p. 2599, as amended, is involved. The determination herein will control the disposition of the same questions presented in the Yosemite Park & Curry Company Case, and the discussion herein with reference to the effect of the retail sales tax will be deemed sufficient for that purpose.

Standard Oil Company by its several actions sought to recover gasoline taxes paid under protest, which were imposed for the distribution and sale of gasoline within the boundaries of Yosemite National Park, Sequoia National Park and General Grant National Park, located within the territorial limits of California.

The plaintiff is a private corporation authorized to do business in California. The problem revolves around the question whether the state of California ceded exclusive jurisdiction to the United States government of the areas comprising the various national parks in such a way as to divest itself of jurisdiction to impose and collect the taxes so paid under protest.

Demurrers to the various complaints were sustained and judgment entered for the defendants. The plaintiff appeals.

[1,2] On February 2, 1848, 9 Stat. 922, by the Treaty of Guadalupe Hidalgo, the Republic of Mexico ceded to the United States government all the lands within the territorial limits of California. The United States thereby became vested with the title to all such lands not held in private ownership. *Thompson v. Doaksum*, 68 Cal. 593, 596, 10 P. 199. The areas now comprising the national parks hereinbefore mentioned were therefore then public lands. The United States retained title to these public lands upon the admission of California to statehood. Act Cong. Sept. 9, 1850, 9 Stats. 452.

On June 30, 1864, 13 Stats. 325, that portion of Yosemite National Park designated in the act as the "Cleft" or "Gorge" in the granite peak of the Sierra Nevada mountains, situated in the county of Mariposa, * * * and the headwaters of the Merced River, and known as the Yo-Semite valley," was granted to the state of California up-

on the express condition that the "premises shall be held for public use, resort, and recreation." By the same act, "Mariposa Big Tree Grove," comprising four sections of land, was granted upon like conditions.

On October 1, 1890, 26 Stats. 650, Congress set apart as a national forest and withdrew from sale and occupancy certain tracts of the public lands in the Sierra Nevada, but expressly excepted therefrom the Yosemite Valley and Mariposa Big Tree Grove theretofore granted to California. A portion of those reserves surrounding Yosemite Valley was later, on February 7, 1905, designated as "Yosemite National Park." 33 Stats. 702.

On March 3, 1905, St.1905, p. 54, California receded and regranted to the United States without reservation the "Cleft" or "Gorge" known as Yosemite Valley, and the "Mariposa Big Tree Grove," and resigned the trusts created and granted by the Act of Congress of June 30, 1864, upon condition that the lands be held by the United States for public use, resort, and recreation. This recession was accepted by Congress on June 11, 1906, 34 Stats. 831, and the areas by the same act were included as part of Yosemite National Park.

The area comprising Sequoia National Park was withdrawn from occupancy and sale and dedicated as a public park on September 25, 1890, 26 Stats. 478. An act of Congress, 26 Stats. 651, enacted on October 1, 1890, established General Grant National Park.

At the time of the recession to the United States of the Yosemite Valley and Mariposa Big Tree Grove there was in effect a statute passed by the Legislature of California in 1891, St.1891, p. 262, providing: "The State of California hereby cedes to the United States of America exclusive jurisdiction over such piece or parcel of land as may have been or may be hereafter ceded or conveyed to the United States, during the time the United States shall be or remain the owner thereof, for all purposes except the administration of the criminal laws of this State and the service of civil process therein."

The plaintiff relies upon the foregoing quoted statute, together with the act of recession of 1905, as supporting its claim that the state of California by the regrant had relinquished exclusive jurisdiction to the United States in the area known as Yosemite.

ite Valley, wherein occurred most of the transactions upon which the taxes involved were imposed and collected.

The defendant, however, contends that the act of the California Legislature approved April 15, 1919, Stats.1919, p. 74, ceding to the national government jurisdiction over Yosemite National Park, Sequoia National Park and General Grant National Park, and the act of acceptance by Congress on June 2, 1920, 41 Stats. 731, constitute the basis upon which depend the rights of the state herein.

The legislative act of 1919 in its pertinent parts provides: "Exclusive jurisdiction shall be and the same is hereby ceded to the United States over and within all of the territory which is now or may hereafter be included in those several tracts of land in the State of California set aside and dedicated for park purposes by the United States as 'Yosemite national park,' 'Sequoia national park' and 'General Grant national park' respectively; saving, however, to the State of California the right to serve civil or criminal process within the limits of the aforesaid parks, * * * and saving further, to the said state the right to tax persons and corporations, their franchises and property on the lands included in said parks, and the right to fix and collect license fees for fishing in said parks."

The 1920 Act of Acceptance reads: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the act of the Legislature of the State of California (approved April 15, 1919), ceding to the United States exclusive jurisdiction over the territory embraced and included within the Yosemite National Park, Sequoia National Park, and General Grant National Park, respectively, are hereby accepted and sole and exclusive jurisdiction is hereby assumed by the United States over such territory, saving, however, to the said State of California the right to serve civil or criminal process within the limits of the aforesaid parks, * * * and saving further to the said State the right to tax persons and corporations, their franchises and property on the lands included in said parks, and the right to fix and collect license fees for fishing in said parks."

The contention of the plaintiff is that the state, having by the 1905 act of recession, granted exclusive jurisdiction of Yosemite Valley to the United States, had nothing

more to grant, and that the attempted cession of 1919 with reservations was an empty gesture. Answering this argument the defendant asserts that the 1905 act of recession did not vest exclusive jurisdiction in the United States, because, so he claims, such exclusive jurisdiction can be acquired only pursuant to clause 17, section 8, article 1 of the Constitution of the United States, which provides: "Congress shall have Power * * * To exercise exclusive Legislation in all Cases whatsoever * * * over all Places purchased by the consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." In this connection reliance is also placed on section 6 of article 13 of the State Constitution, providing that the power of taxation shall never be surrendered or suspended by any grant or contract to which the state shall be a party.

However, we deem it unnecessary to pursue the inquiry into the constitutional question whether exclusive jurisdiction may be ceded to or acquired by the United States of lands within the territorial limits of a state solely for recreational and park purposes. We need note only that the history and reasons for the vesting in the United States of the power to hold exclusive jurisdiction for the enumerated purposes, and many aspects of the controversial question relating to acquisition of exclusive jurisdiction for other purposes, have been stated in the following cases, among others, and do not require repetition here: *Fort Leavenworth R. R. Co. v. Lowe*, 114 U.S. 525, 533, 5 S.Ct. 995, 29 L. Ed. 264; *Benson v. United States*, 146 U.S. 325, 13 S.Ct. 60, 36 L.Ed. 991; *Arlington Hotel Co. v. Fant*, 278 U.S. 439, 49 S.Ct. 227, 73 L.Ed. 447; *Surplus Trading Co. v. Cook*, 281 U.S. 647, 50 S.Ct. 455, 74 L. Ed. 1091; *In re Kelly*, C.C., 71 F. 545; *People v. Mouse*, 203 Cal. 782, 265 P. 944; *Silas Mason, Inc., v. State Tax Commission*, 188 Wash. 98, 61 P.2d 1269, affirmed 58 S.Ct. 233, 82 L.Ed. —; *Ryan v. State*, 188 Wash. 115, 61 P.2d 1276, affirmed 58 S.Ct. 233, 82 L.Ed. —. Beginning at least as early as the decision in *Fort Leavenworth R. Co. v. Lowe*, the Supreme Court of the United States recognized that exclusive jurisdiction could be acquired otherwise than by purchase with the consent of the state Legislature, namely, by cession, if for one or more of the purposes enumerated in the federal constitutional

provision. See *Ryan v. State*, supra, 188 Wash. 115, 61 P.2d 1276, at page 1281. But whether exclusive jurisdiction by any means may be acquired for a purpose not so enumerated may still be an open question. See *Arlington Hotel Co. v. Fant*, 278 U.S. 439, 49 S.Ct. 227, 73 L.Ed. 447; *In re Kelly, C.C.*, 71 F. 545. The controversial point that the United States has the constitutional power to acquire exclusive jurisdiction within state territorial limits of an area devoted solely to park and recreational purposes was expressly left open in the *Arlington Hotel Case*, 278 U.S. 439, at page 454, 49 S.Ct. 227, 230, 73 L.Ed. 447. So far as we know, only two cases have since attempted to resolve the question. In *Yellowstone Park Transportation Co. v. Gallatin County*, 9 Cir., 31 F.2d 644, 645, petition for writ of certiorari denied 280 U.S. 555, 50 S.Ct. 16, 74 L.Ed. 611, the court upheld the exclusive jurisdiction of lands ceded to the United States by the state of Montana for park purposes. The opinion shows that no concurrent jurisdiction or taxing power was reserved and that the express grant of powers to the United States was inconsistent with the reservation of any concurrent jurisdiction. The court supported its statement that "Cessions of exclusive jurisdiction, such as that made by the Legislature of Montana, have been very common in the history of this country, and their effect is well settled," by the single reference to the *Arlington Hotel* decision. The other case, *Yosemite Park & Curry Co. v. Collins*, 20 F.Supp. 1009, 1015, D.C., Southern Div., Northern Dist. of California, will be later discussed.

[3,4] If the legislative act of rescission of 1905, the congressional acceptance thereof, and the related acts prior to that time, were alone to be considered, it might be said that the constitutional question is squarely presented for determination. But as applied to all the territory named, we have a subsequent act of the Legislature ceding title to the United States and expressly reserving, among other matters, the right to exercise in the territory ceded the power to tax persons and corporations, their franchises and property, together with a congressional acceptance in the same express terms. It is not a matter of necessary judicial inquiry as to what prompted these new acts of cession and acceptance, covering public lands reserved to the United States when California was admitted as a state, and lands formerly receded to the

United States without the special reservation. It may be that the respective legislative bodies deemed that, except for the purposes enumerated in clause 17, section 8 of article 1 of the Constitution, and in accord with the declaration of section 6, article 13 of the State Constitution, the power had not been constitutionally delegated to the United States to hold land for other purposes exclusive of any dominion of the state, and that they therefore desired to reframe their agreement to accord with the relative existing rights of the respective sovereigns. In any event, there exists no constitutional inhibition upon the power of the state to cede or the right of the United States to receive limited jurisdiction of lands for the purposes and with the reservations stated in the grant herein. The only proper function of the court, therefore, is to recognize and give effect to the act of recession of 1919 and the act of acceptance of 1920 which appear to constitute a binding and valid definition and mutual recognition of the rights and powers of the respective sovereign parties. All other related considerations fade away when it is realized that, whatever had taken place before, the taxing power of the state was reserved by the act of 1919 and that Congress, by the acceptance act of 1920, recognized the continuance of that power in the state. This express recognition by both sovereigns clearly establishes the existence of the right of the state to tax in the areas designated in accordance with the power as reserved and defined in both acts.

It is not questioned that the United States may hold limited jurisdiction of land for other than the purposes enumerated in clause 17 of section 8 of article 1 of the Constitution; and the cases relied upon do not preclude a holding that the extent of such limited jurisdiction for other than the specified purposes may not be the subject of change by mutual agreement between the state and the United States.

In *Fort Leavenworth R. R. Co. v. Lowe*, supra, 114 U.S. 525, at page 539, 5 S.Ct. 995, 1003, 29 L.Ed. 264, we find this statement: "It not being a case where exclusive legislative authority is vested by the constitution of the United States, that cession could be accompanied with such conditions as the state might see fit to annex, not inconsistent with the free and effective use of the fort as a military post." In that case the state by the act of cession of land to be used as a military post had reserved

the power to tax railroad and other corporations. It was held that the reservation of the taxing power did not interfere with the use of the area as a military post and that there was no constitutional prohibition against the exercise of the reserved power. See, also, *Chicago & Pacific Ry. Co. v. McGlinn*, 114 U.S. 542, 545, 546, 5 S.Ct. 1005, 29 L.Ed. 270; *United States v. Unzeuta*, 281 U.S. 138, 142, 50 S.Ct. 284, 285, 74 L.Ed. 761. The holding in the case of *United States v. Unzeuta*, supra, 281 U.S. 138, at page 143, 50 S.Ct. 284, 285, 74 L.Ed. 761, that ceded jurisdiction which had been accepted could not be recaptured by the action of the state alone (which sought to amend the act of cession), is consistent with our conclusions herein. So, also, is the statement in *Re Ladd*, C.C., 74 F. 31, at page 38 (wherein a state amendatory act was held to be ineffective to abrogate the existing contract, and there was no express acceptance), that a ceded exclusive jurisdiction continues until "terminated, either by the United States ceasing to own and occupy the reservation, or by the United States retroceding its exclusive jurisdiction to the state." Nor is *Standard Oil Co. v. California*, 291 U.S. 242, 54 S.Ct. 381, 78 L.Ed. 775, in conflict. There the tax on gasoline, Stats.1923, p. 571, was attempted to be laid on deliveries to the Post Exchange within the Presidio in San Francisco, a military reservation over which the United States was held to have been vested with exclusive jurisdiction under the constitutional section.

We conclude that the legislative act of 1919 and the congressional acceptance of 1920 operate to reserve to the state the powers stated in the respective enactments.

[5] Another ground of resistance to the imposition of the sales and gasoline taxes in the national park areas is that such taxes, being in their nature excise taxes rather than taxes on persons or property, are not within the express reserved power.

The reserved taxing power is couched in the following language: "And saving further to the said State the right to tax persons and corporations, their franchises and property on the lands included in said parks, and the right to fix and collect license fees for fishing in said parks." It is asserted that inasmuch as a tax such as the retail sales tax or gasoline tax is in its nature an excise tax, *People v. Ventura*

Refining Co., 204 Cal. 286, 294, 268 P. 347, 283 P. 60; *Roth Drug, Inc., v. Johnson*, 13 Cal.App.2d 720, 730, 57 P.2d 1022, and being neither a tax on persons, such as a poll tax, nor a tax on tangible property, the power to impose it is not within the express reservation. The plaintiff misconceives the meaning and purpose of the phraseology employed. Contrary to its contention, the rule of strict construction does not necessarily apply. The pertinent considerations are stated in *Ryan v. State*, supra, 188 Wash. 115, 61 P.2d 1276, at page 1283, as follows: "But, since self-preservation is the first law of nations and states, as well as of individuals, it will not be presumed, in the absence of clearly expressed intent, that the state has relinquished its sovereignty. * * * The taxing power of the state is never presumed to have been relinquished unless the language in which the surrender is made is clear and unmistakable." And the following is also pertinent: "This is not a contest between the federal government and the state as to jurisdiction. It is a contest between the state, asserting its concurrent, or partial, jurisdiction, and an individual who asserts that exclusive jurisdiction rests in the federal government. So far from there being any contest as to jurisdiction between the two sovereign powers, the record discloses that they are working in harmony and accord, each exercising the field for which it is the better equipped and each, at the same time, recognizing the field of the other. The federal government, therefore, cannot possibly be prejudiced by the result of this action."

[6] So, in line with the applicable principle, the reserved power must be construed most strongly in favor of the state in order to preserve its jurisdiction as to matters with which it is directly and immediately concerned, and as to which jurisdiction has not been ceded or granted to the federal government. We find support also in *Nikis v. Commonwealth*, 144 Va. 618, 131 S.E. 236, 238, 46 A.L.R. 219, where it was said: "That the right of a state to tax the property of others located upon lands owned by the United States, although it cannot tax such lands, will not be held to be abandoned by the state, except for the most compelling reasons, is quite manifest from several decisions of the Supreme Court of the United States." It may be noted that it was there held that to be accorded immunity from

state taxation it must be shown not only that the land was acquired by the United States, but also that it was acquired and used for one of the purposes indicated in article 1, section 8, clause 17 of the Constitution.

[7-9] A consideration of the taxing statutes shows that the tax is imposed respectively "upon retailers," section 3, Stats.1933, p. 2599, Stats.1935, p. 1252, and upon "distributors" of gasoline, and it has so been held. *Roth Drug, Inc., v. Johnson*, supra, 13 Cal.App.2d 720, at page 736, 57 P.2d 1022; *People v. Herbert's of Los Angeles, Inc.*, 3 Cal.App.2d 482, 39 P.2d 829; *People v. Ventura Refining Co.*, supra, 204 Cal. 286, at page 294, 268 P. 347, 283 P. 60; *Rio Grande Oil Co. v. Los Angeles*, 6 Cal.App.2d 200, 201, 44 P.2d 451. This language in the statutes will not, of course, be construed to disturb the classification of taxable subjects—persons, property, and business. *State Tax on Foreign-held Bonds*, 82 U.S. 300, 319, 15 Wall. 300, 21 L.Ed. 179; 26 R.C.L. p. 34; 1 *Cooley on Taxation*, p. 172. Neither does it mean that the excise taxes imposed should be considered as a tax "on persons" as a subject of taxation. The language of the statutes and the decisions still leaves the sales and gasoline taxes in the category of "excises" or tax on business. Nevertheless, as stated in vol. 1, *Cooley on Taxation*, pp. 68-69, taxes are contributions from persons or property, and "whether a tax be considered as imposed on the person or on the property, it is clear that all taxes are imposed either upon the one or the other." It seems obvious that the language of the reservation of the taxing power contemplated the reservation to the state of the general taxing power without any exceptions other than that necessarily arising from the ownership of the land and property by the United States government. There is no inconsistency created by the express inclusion in the reserved power of the "right to fix and collect license fees for fishing in said parks." Because of the nature of the privilege specially singled out, its express inclusion does not necessarily indicate that the taxing of all other privileges was intended to be excluded from the reservation. On the contrary it would seem that it was deemed necessary expressly to refer to that subject-matter, as otherwise it might be claimed that the cession carried the exclusive supervision

and regulation of fishing privileges in the streams included in the ceded areas.

[10] There is no merit in the contention that the privilege of making sales in the ceded areas emanates solely from the national government. The mere fact that the taxing power for all general purposes has been reserved by the state with the consent of Congress is a recognition by the latter that the granting of such privileges emanates as well from the state.

The main contentions urged to establish the invalidity of the reserved taxing power as here exercised by the state are answered adversely to the claims in the recent case of *Rainier National Park Company v. Martin, D.C.*, 18 F.Supp. 481, affirmed 58 S.Ct. 478, 82 L.Ed. —. There the power, exercised under a similar reservation, to impose on and collect a state retail sales tax from the Rainier National Park Company was held to be valid, and was sustained.

In *Yosemite Park & Curry Co. v. Collins*, supra, it was held that the state of California had at one time ceded exclusive jurisdiction of Yosemite valley to the United States, that the subsequent legislation attempting to reserve the taxing power was ineffective, and therefore that the state had no reserved power to enforce in Yosemite valley the Alcoholic Beverage Control Act, 1935 Stats. c. 330, p. 1123. That act was there declared to be a complete liquor control measure, including provisions for license fees and excise taxes. Relative to the balance of Yosemite Park, the court held that the reservation of the taxing power did not include the power to impose a license tax. For the reasons hereinabove stated, we are led to disagree with those conclusions of the court in that case. Nor do we perceive that they were necessary to its decision. The result in that case, if it be correct, is adequately supported by the final ground stated by the court, as follows: "While a revenue measure does not preclude the possibility of a clash between sovereignties, it does not invite one as a regulatory measure does. California has ceded the Park to the United States, which has agreed to police it. Now by reason of the Alcoholic Beverage Control Act, California evidently claims the retention of her police power. Such a claim is violative of the police jurisdiction placed in the hands of the national government, and is void. Since the primary purpose of California's tax measure is the

regulation of the intoxicating liquor business; since such regulation constitutes an exercise of the police power which is beyond the jurisdiction of the state, the measure cannot bestow upon California the power to collect license taxes from plaintiff for the importation and sale of liquors."

However, the exercise of the reserved power by the imposition of retail sales and gasoline taxes creates no interference with the exercise of the jurisdiction acquired by the United States pursuant to the grants herein involved.

The judgment in each case is affirmed.



10 Cal.2d 770

YOSEMITE PARK & CURRY CO. v. JOHNSON, State Treasurer.

Sac. 5176.

Supreme Court of California.

Feb. 25, 1938.

Rehearing Denied March 25, 1938.

1. Licenses ⇐5

A private corporation which conducted a business in the Yosemite National Park under a contract with the Secretary of the Interior was not exempt from state tax on its retail sales to visitors in the park because of its operation as a United States government lessee and concessioner. St.Cal. 1933, p. 2599, as amended.

2. Licenses ⇐5

A private corporation conducting business in the Yosemite National Park under a contract with the Secretary of the Interior was not exempt from payment of sales tax imposed on its retail sales to visitors in the park on ground that the taxation would hinder the corporation in the efficient performance of its contract with the federal government. St.Cal.1933, p. 2599, as amended.

In Bank.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Action by the Yosemite Park & Curry Company against Charles G. Johnson, as

Treasurer of the State of California, to recover sales taxes paid under protest. Judgment for defendant, and plaintiff appeals.

Affirmed.

Pillsbury, Madison & Sutro, of San Francisco (Felix T. Smith and Sigvald Nielson, both of San Francisco, of counsel), for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney and James J. Arditto, Deputy Attys. Gen., for respondent.

PER CURIAM.

The plaintiff herein sued to recover sales taxes imposed on retail sales to visitors and others in Yosemite National Park, and paid by it under protest. A demurrer to the complaint was sustained, and judgment entered for the defendant. The plaintiff appealed from the judgment.

Most of the questions raised are answered by the decision this day filed in the case of Standard Oil Company of California v. Johnson, Cal.Sup., 76 P.2d 1184, this day decided, and that decision is deemed controlling on the disposition of those questions herein.

[1,2] The plaintiff is a private corporation authorized to do business in this state. It operates as United States government lessee and concessioner in Yosemite Valley under a contract with the Secretary of the Interior. The additional contention herein that as such lessee and concessioner it is not subject to the reserved taxing power of the state has been answered adversely in the case of Rainier National Park Co. v. Henneford, 182 Wash. 159, 45 P.2d 617, petition for writ of certiorari denied 296 U.S. 647, 56 S.Ct. 307, 80 L.Ed. 460. In that case a similar lessee and concessioner operating in a national park was held subject to taxation by the state. See, also, Silas Mason, Inc., v. State Tax Commission, 188 Wash. 98, 61 P.2d 1269, affirmed 58 S.Ct. 233, 82 L.Ed. —, and Rainier National Park Co. v. Martin, D.C., 18 F.Supp. 481, affirmed 58 S.Ct. 478, 82 L.Ed. —. We find no merit in the contention. Nor may it be said that the exercise of the reserved taxing power will hinder the Yosemite Park & Curry Company in the efficient performance of its contract with the federal government.

The judgment is affirmed.

10 Cal.2d 730

In re LIVINGSTON et al.

**LIVINGSTON v. ROBINSON, Treasurer
of Nevada Irr. Dist., et al.**
S. F. 15928.

Supreme Court of California.

Feb. 24, 1938.

As Modified on Denial of Rehearing
March 25, 1938.

1. Waters and water courses ⇨230(4)

Holders of irrigation district bonds who approved refunding plan providing that such plan could be modified with approval of Securities Commission, majority of electors, and 75 per cent. of bondholders, and who exchanged their bonds for refunding bonds, reciting that they were issued under and subject to refunding plan, were bound by all provisions of plan and by modification of interest rate effected pursuant thereto, and could not object that modification and approvals thereof were unauthorized. St.1897, p. 254, as amended; St.1931, pp. 778-782, §§ 32a-32e; St.1937, p. 457, § 32a.

2. Waters and water courses ⇨230(4)

The statute providing for issuance of irrigation district refunding bonds and approval of modifications of refunding plans manifests intent to clarify former statutes by clearly authorizing modification of refunding plans. St.1897, p. 254, as amended; St.1931, pp. 778-782, §§ 32a-32e; St.1937, p. 457, § 32a.

3. Statutes ⇨251**Waters and water courses** ⇨230(4)

The statute authorizing modification of refunding plans for irrigation districts became effective when signed by Governor on May 4, 1937, under emergency clause, and hence validated modification which was submitted to bondholders January 1, 1937, approved by Securities Commission June 22, and approved by special election August 11. St.1937, p. 457, § 32a.

4. Statutes ⇨79(1), 101(1)

The statute authorizing modification of refunding plans for irrigation districts is a mere amendment of former valid statute, and is not unconstitutional as "special legislation" for conducting elections or as granting any "special or exclusive right, privi-

lege or immunity." St.1937, p. 457, § 32a; Const. art. 4, § 25, subds. 11, 19.

[Ed. Note.—For other definitions of "Local Law" and "Special Law." see Words & Phrases.]

5. Statutes ⇨68

A law is general and uniform and affords equal protection in its operation, when it applies equally to all persons embraced within the class to which it is addressed, if classification is founded on some natural, intrinsic, or constitutional distinction. Const. art. 4, § 25, subds. 11, 19.

6. Constitutional law ⇨70(1)

Question of propriety of classification in statute is generally one for the legislative power, determined in light of its knowledge of all the circumstances and requirements, and its discretion will not be overthrown unless palpably arbitrary.

7. Constitutional law ⇨48

In determining reasonableness of classification in statute, it will be presumed that Legislature inquired whether there were evils to be remedied and that classification was based upon such inquiry.

8. Constitutional law ⇨70(1)

When the Legislature has determined necessity of an urgency measure as authorized by Constitution, Legislature's judgment is final, unless no declaration of facts constituting urgency, or a clearly insufficient declaration, is included in the act.

9. Constitutional law ⇨70(1)

The court would not interfere with legislative determination of existence of an urgency requiring that act authorizing modification of irrigation district refunding plans be made immediately effective. St. 1937, p. 457, § 32a.

10. Waters and water courses ⇨230(4)

Where irrigation district bonds originally bore 5½ per cent. interest and refunding bonds bore 4 per cent. fixed interest and 1½ per cent. contingent interest, further change reducing fixed interest to 3 per cent. and increasing contingent interest to 2½ per cent. was a "modification" of refunding plan, as authorized by such refunding plan, and was valid. St.1937, p. 457, § 32a.

[Ed. Note.—For other definitions of "Modification," see Words & Phrases.]

In Bank.

Mandamus proceeding by John A. Livingston, against H. W. Robinson, as Treasurer of Nevada Irrigation District, and the Nevada Irrigation District, to compel payment of interest coupons on bonds, wherein J. R. Mason and others intervened. An alternative writ was issued and, on return thereof, the controversy was submitted upon an agreed statement of facts.

Peremptory writ denied.

A. L. Cowell, of Stockton, Cal., for petitioner.

C. F. Metteer, of Sacramento, Orrick, Palmer & Dahlquist, W. H. Orrick, George Herrington, and J. C. Peppin, all of San Francisco (Orrick, Dahlquist, Neff & Herrington, of San Francisco, of counsel), for respondents.

W. Coburn Cook, of Turlock, for interveners.

Treadwell & Laughlin, of San Francisco, *amicus curiae* for Edward F. Treadwell.

WASTE, Chief Justice.

In this proceeding in mandamus an alternative writ was issued. On the return thereof the controversy was submitted upon an agreed statement of facts.

The Nevada Irrigation District was organized in 1921 under the California Irrigation District Act, St.1897, p. 254, as amended. Its principal revenue was derived from the delivery of water to the Pacific Gas & Electric Company for power purposes; the water being later released below the power plants of the company for distribution to the landowners of the district for irrigation and other uses. Subsequent to its organization, the district issued bonds to the amount of \$8,100,000, maturing each year beginning 1933, and bearing interest at the rate of 5½ per cent. No revenues were received under the power contracts until 1928. Thereafter, owing to a shortage of water, the income was not sufficient to pay the interest on the outstanding bonds. In 1931, the attention of the Legislature was directed to the critical situation of the Nevada Irrigation District and other similar districts in the state, with the result that, at its session that year, an emergency measure was passed which amended section 32a, as added by St.1923, p. 628, and added sections 32b to 32e, inclusive, to the California Irrigation District Act, Stats.1931, p. 777-782, providing for the adoption by irrigation districts of a plan for refunding

their outstanding indebtedness. Pursuant to that act, as amended, the Nevada Irrigation District adopted a refunding plan (herein referred to as the 1931 plan), which was approved, as required, by the California Bond Certification Commission and by the electors of the district. The holders of all of the district's bonds also approved the plan, and exchanged their bonds for bonds of the first refunding issue. These refunding bonds provided for fixed interest at the rate of 4 per cent. and contingent interest (payable only when earned) at the rate of 1½ per cent. Provision was made in section VIII of the plan for subsequent modification of its terms and conditions, if that should be deemed desirable by the district, such modification to be accomplished by the approval of the California bond certification commission and the consent of the holders of 75 per cent. in principal amount of the refunding bonds then outstanding. The plan provided for a special reserve fund for emergency purposes, and a sinking fund for the retirement of refunding bonds. Subsequently, the income of the district not being sufficient to build up the required reserve fund, and no money being available for the creation of the sinking fund, the district "deemed it desirable" to secure a modification of the terms of the 1931 plan, and on January 1, 1937, submitted to the bondholders such modification whereby the rate of fixed interest was reduced from 4 per cent. to 3 per cent. (with 2½ per cent. contingent interest). On June 22, 1937, the California Districts Securities Commission (successor to the California Bond Certification Commission) approved the modification, and on August 11, 1937, a special election was held for the purpose of securing the assent of the qualified electors of the district. At such election a majority of the votes were cast in favor of the modification, and it was approved by 90 per cent. of the holders of the refunding bonds issued under the 1931 plan.

Petitioner, a nonconsenting bondholder, contends that he is not bound by the terms of the 1937 modification. He presented to the respondent treasurer the coupon maturing July 1, 1937, in the amount of \$20, originally attached to his bond. Although there are funds in the treasury of the district available for the purpose, the treasurer refused to pay any amount in excess of \$15, on the ground that the interest owing on the bond was reduced from 4 per cent. to 3

per cent. after January 1, 1937. To avoid a multiplicity of suits by other nonconsenting bondholders, petitioner seeks a determination by this court, under section 1138 of the Code of Civil Procedure, and sections 1139, 1140, as amended by St.1933, p. 1904, of the following questions: Whether or not the modification of the 1931 plan is valid, legal, and effective; whether such modification is binding upon petitioner and any other bondholders who did not, by their affirmative acts, assent to the modification; and whether the respondents are not under a duty to pay the petitioner the full face amount of the fixed interest coupons attached to his bond. If the court shall find in petitioner's favor, he asks that a peremptory writ issue ordering the respondent treasurer to pay to petitioner the amount of the present coupon and of all subsequent coupons at the rate of 4 per cent. per annum.

[1] Petitioner urges that, inasmuch as there was no provision in the California Irrigation District Act of 1931, *supra*, authorizing a district, adopting the plan therein provided for the refunding of its outstanding indebtedness, to subsequently modify that plan, section VIII of the 1931 plan above referred to, and which permitted such modification, was without authority of law, and the modification made pursuant thereto is null and void. Section 32a of the act adopted in 1931 declares that the board of directors of any irrigation district which desires to refund its outstanding indebtedness may submit to the California Bond Certification Commission "its proposed plan for funding or refunding such bonds," and upon approval of the plan by the commission, the board of directors of the district shall call an election for the purpose of authorizing the issuance of such refunding bonds. It places no restriction upon the features to be incorporated in the plan, other than that the maturity of the bonds shall not be more than fifty years from their date and the rate of interest shall not exceed 6 per cent. per annum. Even though there was no express statutory authority for the inclusion of the modification clause in the 1931 plan, it was apparently not deemed unfair or unreasonable, for it received the approval of the bond certification commission and of the electors of the district, and was ratified by the bondholders themselves, *all* of whom exchanged their bonds for the refunding bonds. Each of these latter bonds contained on its face the provision that it was issued under the 1931

plan and was subject to its terms and conditions, "to all of the provisions of which Refunding Bonds [including section VIII of the plan here under attack] the bearer or registered owner of this refunding bond by his acceptance hereof assents."

The validity of these refunding bonds of the Nevada Irrigation District was the subject of consideration by this court in *Mulcahy v. Baldwin*, 216 Cal. 517, 15 P.2d 738, a proceeding to compel the secretary of the board of directors of the district to countersign the bonds. An objection to the bonds in that case was based upon the contention that the contract rights of the holders of outstanding bonds who might not elect to convert their holding into refunding bonds, as well as the rights of contract with the landowners upon the organization of the district, would be impaired by certain provisions of the 1931 Irrigation District Act. The court there stated (216 Cal. 517, at page 526, 15 P.2d 738, 741): "It is elementary that there can be no impairment of a contract by a change thereof *if the change is effected with the consent of the contracting party affected thereby.*" (*Italics added.*)

Petitioner claims there is no express or implied provision in the bonds for modifying the interest rate of bonds after their issuance. Section 32d of the Irrigation Act provides that if interest on the bonds of the district is subject to any limitation with respect to its payment, a statement of such limitation must be contained in the bond. Since the 1931 plan contained numerous limitations upon the payment of interest, certain of which could not be determined in advance, being to some extent dependent on the modification provided for—the only feasible method of incorporating in the bond a statement of such limitations was by setting forth the entire plan, including the provision for its modification. Having accepted the refunding bond with knowledge of the express declaration therein that it was issued under the 1931 plan, and the provision for modification being a part of that plan, petitioner cannot now complain that the district had no authority to insert in the bond any provision that the rate of interest might be changed by subsequent proceedings.

[2] Petitioner further contends that the California District Securities Commission had no authority to give consent to such a change in the interest rate of the bonds. The approval of the commission was re-

quired by the Irrigation District Act as a condition precedent to the effectiveness of the plan provided for in section 32a. Accordingly, such a plan (containing a proviso permitting a subsequent modification of its terms and conditions without limitation) having been submitted to and having received the required approval of the commission, and having been voluntarily approved by the electors of the district and the bondholders, it cannot now be urged that the commission had not the right to consent to that to which all the parties involved had agreed it might consent—a modification of the plan. As an indication that such a provision for modification was regarded by the Legislature as reasonable and lawful, that body, at its 1937 session, passed an emergency measure amending section 32a, Stats.1937, p. 457, by expressly declaring that a provision for modification may be inserted in a plan adopted under the act as amended in 1931, and if the proposed modifications meet with the approval of the commission, the directors of the district shall call an election to authorize such modifications; a majority vote only being required for such authorization. The urgency clause attached to this amendment recites that certain of the districts "have reserved as a condition to said plan so approved [by the Commission and the electors] the right to modify such plan prior to its consummation and thereafter have found it necessary to modify such original proposed plans in one or more respects," section 2, St.1937, p. 459, the purpose of the 1937 amendment being to immediately clarify the former statute so as to clearly authorize modification of the proposed plans of the districts for refunding their bonded indebtedness.

Petitioner states that the "statutes will be searched in vain for any authority to give the holders of three-fourths of outstanding bonds authority to bind the other bondholders to a modification of the terms of the bond," citing in support of his contention the decision of this court in *County of Los Angeles v. Rockhold*, 3 Cal.2d 192, 44 P.2d 340, 349, 100 A.L.R. 149. That case is not in point. The refunding proceedings there involved were instituted pursuant to the provisions of the Refunding Special Assessment Bond Act of 1933, Stats.1933, p. 1915, providing, section 15, that the refunding could take place when 75 per cent. of the holders of the outstanding bonds consented. The court held that the act did not

adequately safeguard the rights of the 25 per cent. of dissenting bondholders, and was therefore unconstitutional, saying: "There can be no doubt that it is indispensable, from a constitutional standpoint, so far as bondholders are concerned, that either 100 per cent. consent to the change or that the dissenting bondholders be so taken care of that no impairment of their contract ensues." That case is clearly distinguishable from the present proceeding, where the refunding plan was adopted and assented to by *all* of the bondholders. A sufficient answer to petitioner's contention is that he did deposit his original bond for cancellation and accept in its place the refunding bond specifically incorporating in its terms the provision for modification of the 1931 plan with the "approval of the * * * holders of seventy-five (75) per cent in principal amount of the Refunding Bonds then outstanding," such modification to be "binding upon the holders of the then issued and outstanding Refunding Bonds." Upon this acceptance of the refunding plan and the cancellation of the original bonds, a change was effected in the affairs of the district, and its board of directors was justified in relying upon the agreement of the bondholders, including petitioner, that the plan might subsequently be modified, "if it should be deemed desirable."

[3] The next assertion of petitioner is that the 1937 modification, by its terms, would become effective and binding on all the bondholders only when an election was held in the district for the purpose of approving the modification, and that there was no authority for such an election when the modification was drawn and the bonds were issued. The modification was submitted to the bondholders on January 1, 1937. It was approved by the California Districts Securities Commission on June 22, and the special election called for the purpose of securing assent of the electors of the district was held on August 11. As previously stated, the Legislature, in 1937, amended section 32a of the California Irrigation District Act, Stats.1937, p. 457, by providing that, "When any district shall have submitted its proposed plan for funding or refunding such bonds to the California Districts Securities Commission, and as one of the terms or conditions of such plan, has reserved the right to modify such plan one or more times, and said commission shall have approved such plan, and when the board of directors

of such district shall thereafter desire to modify such plan, such board of directors may submit the proposed modifications of such plan for approval to said California Districts Securities Commission," and, upon such approval, shall call an election for the purpose of authorizing such modifications, a majority vote only being required. Recognizing that certain districts had reserved "as a condition to said plan so approved the right to modify such plan prior to its consummation and thereafter have found it necessary to modify such original proposed plans in one or more respects," the Legislature declared this amendment to be an urgency measure, to go into immediate effect in order to clarify the statute so as to clearly authorize districts to modify their proposed plans for refunding their bonded indebtedness, thus avoiding the necessity for advancement by such districts of "large cash payments for maturing bonds and interest coupons on July 1, 1937, leaving them without sufficient funds to enable them to operate properly and efficiently their distribution works." Section 2, St. 1937, p. 459. This act was signed by the Governor and became effective on May 4, 1937. Therefore, when the final procedural step was taken, that is, the election for the purpose of approving the modification, the 1937 amendment to section 32a was in full force and effect.

[4-7] Petitioner attacks this amendment as special legislation, and violative of article 4, section 25, subdivisions 11 and 19 of the Constitution. In *Mulcahy v. Baldwin*, supra, a similar objection was made to the validity of the 1931 amendments to the Irrigation Act. The objection was overruled by the court. The 1937 act is merely an amendment of section 32a. It applies equally to all irrigation districts which have taken advantage of the statute authorizing a plan for the refunding of their outstanding indebtedness and, as a condition of such plan, have reserved the right to modify it. "A law is general and uniform and affords equal protection in its operation when it applies equally to all persons embraced within the class to which it is addressed, provided that such class is founded upon some natural or intrinsic or constitutional distinction between the persons composing it and others not embraced in it." *Ex parte Weisberg*, 215 Cal. 624, 12 P.2d 446, 449. The question of classification is generally one for the legislative power, to be determined by it in the light of its knowledge of all

the circumstances and requirements, and its discretion will not be overthrown unless it is palpably arbitrary. *Wores v. Imperial Irr. Dist.*, 193 Cal. 609, 227 P. 181. It will be presumed that the Legislature made inquiry to determine whether or not there were evils to be remedied and that the classification made was based upon the result of the inquiry. *Ex parte Girard*, 186 Cal. 718, 200 P. 593; 3 Cal. Jur., Ten-Year Supp., p. 803.

[8,9] The next complaint of petitioner is that the facts allegedly justifying the urgency feature of the statute "do not show any necessity for the preservation of the public peace, health and safety, and therefore the act did not go into effect until the regular time in August." Authority is conferred upon the Legislature to determine when urgency measures are necessary, and when such necessity has been determined as provided by the Constitution, the judgment of the Legislature is final, and will not be interfered with by the courts unless no declaration of facts constituting such emergency is included in the act or unless the statement of facts is so clearly insufficient as to leave no reasonable doubt that the urgency does not exist. *Hollister v. Kingsbury*, 129 Cal. App. 420, 18 P.2d 1006. We see no reason, in the present instance, for interfering with the legislative determination that an emergency existed.

[10] The final contention of petitioner is that the reduction of interest on bonds already issued was not such a "modification" as was contemplated by section VIII of the 1931 plan. Under that plan the original rate of 5½ per cent. interest was changed to 4 per cent., with a 1½ per cent. contingent interest. In the 1937 plan, now under attack, there was a further change, in that the fixed interest was reduced to 3 per cent. with a 2½ per cent. contingent interest—the aggregate of fixed and contingent interest always remaining at 5½ per cent. We are of the view that this was such a modification as was contemplated by section VIII. In the last analysis, the change resolves itself into merely a readjustment of the method of paying interest on the bonds and is essential to preserve the security of the bondholders in accordance with the fundamental principles upon which the 1931 plan was based. Petitioner cannot now be heard to assert, five years after the refunding bonds issued under this plan were approved by

this court in *Mulcahy v. Baldwin*, supra, that he is not bound by all the terms and conditions clearly and specifically incorporated in those bonds. Ninety per cent. of the bondholders agreed that the further modification of the plan in 1937 was fair, equitable, and reasonable, and for the best interests of all the bondholders. Because of the form of the refunding bonds held by the petitioner and the incorporation therein by reference of the 1931 plan, the petitioner will be held to have agreed that even 75 per cent. of the holders of the refunding bonds could bind the holders of all thereof. We conclude therefore that the directors of the district had the authority, with the consent of the bondholders theretofore given, to modify the 1931 plan with reference to the payment of interest, and to fix such interest on the refunding bonds at 3 per cent. in accordance with the terms of the 1937 modification.

J. R. Mason, one of the interveners in this controversy, was the owner of a number of bonds of the Nevada Irrigation District. He exchanged eleven bonds of the original issue for refunding bonds under the 1931 plan, and subsequently purchased additional refunding bonds in the open market. Gilbert Moody, the other intervener, is the holder of certain interest coupons detached from one of the refunding bonds. On the face of all of these bonds appeared the following: "This refunding bond is one of an authorized issue of refunding bonds of Nevada Irrigation District * * * known as its First Refunding Issue, * * * and all issued under and subject to the provisions of a Refunding Plan dated June 1, 1931, to which Refunding Plan reference is hereby made for a statement of * * * the rights of the holders of the refunding bonds and of interest coupons in respect thereto, and the terms and conditions upon which the refunding bonds are issued and secured, to all of the provisions of which Refunding Plan the bearer or registered owner of this refunding bond by his acceptance hereof assents." Notwithstanding this provision in the refunding bonds, interveners deny that they are bound thereby. J. R. Mason alleges that, while "expressly repudiating" the 1931 plan, he did exchange eleven of his bonds of the

original issue for refunding bonds, and has since purchased thirty-four additional refunding bonds. It is only necessary to say, in reply to the contention of the interveners, that, having accepted the refunding bonds, they are bound by all the provisions contained therein.

Interveners further allege that the district's obligation to pay interest at the rate of 4 per cent. was "to be absolute and unconditional." A reading of the 1931 plan fails to disclose the use of the words "absolute and unconditional." The 4 per cent. interest was therein referred to as "fixed interest" to distinguish it from the "contingent interest" provided for. In any event, interest was to remain at the rate fixed unless and until there was a modification of the terms and conditions of the plan. The rate of interest to be paid on the bonds was but one feature of the plan which the directors of the district "deemed it desirable" to modify.

The principal contentions made by the interveners and amicus curiae have already been disposed of. We do not deem it necessary to discuss other points raised by them.

The legality of the refunding bonds issued under the 1931 plan having been established in the case of *Mulcahy v. Baldwin*, supra, and the 1937 modification, having been prepared in accordance with the terms of that plan and having received the approval of the directors and of a majority of the electors of the district, as well as the California Districts Securities Commission and of more than the required 75 per cent. of the holders of the refunding bonds issued under the plan, such modification is valid, legal, and effective. The nonconsenting bondholders, by their agreement lawfully expressed, are bound thereby. The 1937 modification properly relates, among other things, to a change in the rate of interest on the bonds already issued. Petitioner, therefore, is entitled to but 3 per cent. interest on his bond, together with the 2½ per cent. contingent interest, from and after January 1, 1937, pursuant to the provisions of the 1937 modification.

The peremptory writ is denied

We concur: SHENK, J.; CURTIS, J.; EDMONDS, J.; LANGDON, J.

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CUNHA v. LEWIS et al.

Civ. 5898.

District Court of Appeal, Third District,
California.

March 5, 1938.

1. New trial ⇨75(1)

If, in opinion of trial court, damages which were awarded plaintiff were inadequate, court was under duty to grant new trial.

2. Appeal and error ⇨977(3)

The Court of Appeal should affirm an order granting new trial unless record reveals an abuse of discretion by trial court in granting the order.

3. New trial ⇨75(4)

\$900 held inadequate so as to require new trial, where middle aged woman suffered concussion of brain, fractured nose, lacerations across nose and cheek leaving permanent scar, cut on left knee somewhat stiffening knee and leaving permanent scar, and nine months later she still suffered from dizziness and headaches, and she remained in hospital 10 days and incurred \$175 expense for doctor's services.

4. Damages ⇨130(4)

Concussion of the brain is an injury of such a degree that a few hundred dollars damages allowed as compensation is wholly inadequate.

5. New trial ⇨72

The trial court has duty of weighing evidence, and, if satisfied that verdict is against weight of evidence, verdict should be promptly set aside.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Mary Cunha against Raymond Lewis and others for injuries sustained in an automobile accident. Judgment for plaintiff for \$900, and from an order granting a new trial, defendants appeal.

Affirmed.

F. M. Ostrander, of Merced, for appellants.

H. K. Landram, of Merced, for respondent.

Mr. Justice PLUMMER, delivered the opinion of the court.

The plaintiff had judgment against the appellants in the sum of \$900 for and on account of injuries suffered by her in an automobile accident which occurred on or about the 26th day of March, 1936, upon the Golden State highway in the county of Merced. After the entry of judgment the plaintiff made a motion for a new trial based upon the inadequacy of the damages awarded by the jury. Upon the hearing of such motion the trial court granted the same on the ground of the insufficiency of the evidence to support the verdict, or, rather, upon the ground that the damages awarded were inadequate to fittingly compensate the plaintiff for the injuries sustained by her. From the order of the court granting a new trial this appeal is prosecuted. The injuries were inflicted, as stated, on or about the 26th day of March, 1936. The trial of the action was had on the 15th day of December, 1936.

The transcript of the evidence in this case is exceedingly brief, but a reading of the transcript shows the following: That liability for the injury occasioned to the plaintiff is admitted, and the only question presented for consideration was and is the amount of damages awarded, or that should be awarded.

We find in the reporter's transcript testimony which sustains the following propositions: That the plaintiff was rendered unconscious for a short period of time after the accident; that she was still somewhat in that condition after being removed to an hospital; that she suffered a concussion of the brain; that she had a fractured nose; that there were somewhat deep lacerations across her nose and on her right cheek; that these lacerations left a permanent physical scar; that her nose is more or less permanently flattened; that she had a cut on her left knee which left a permanent scar; that the injuries to the knee resulted somewhat in the stiffening of the same, and this condition existed at the time of the trial. There were also some general bruises on the body. It appears that the plaintiff complained of severe pain in the chest and neck for some weeks after the accident; that from the time of the accident up to the time of the trial the plaintiff suffered from dizziness and frequent headaches; also suffered severe nervous shock. There is also some testimony in the record that the plaintiff's sight in her right eye and hearing in her right ear were somewhat affected. The plaintiff

was required to remain in the hospital for ten days. The doctor's services were estimated to be reasonably worth the sum of \$175. Prior to the time of the accident the plaintiff was a strong, vigorous woman, in early middle life, able to do all necessary housework, and in addition frequently helped her husband in the field and in taking care of livestock; that after the accident she was unable to do any housework for some two months. The plaintiff also sustained an injury to one arm, and at the time of the trial had difficulty in raising her arm so as to place her hand on the back of her head.

[1,2] That there was some conflicting testimony as to the extent of the injuries suffered by the plaintiff is immaterial. The trial court had the advantage of the presence of the witnesses, of judging of their credibility and determining the weight that should be given to the testimony presented, and if, in its judgment, the testimony showed that the plaintiff had been awarded inadequate damages, it was the duty of the court to grant a new trial, and unless it appears from the record that there has been an abuse of discretion, this court should affirm the order granting the plaintiff a new trial.

[3,4] As to the sufficiency of the evidence to sustain a greater verdict, or to show that the court did not abuse its discretion in granting a new trial, it is only necessary for us to call attention to one or two of the injuries shown by the testimony to have been suffered by the plaintiff, to wit: That the plaintiff suffered a concussion of the brain, and that at the trial of the case she still complained of dizziness

and frequent headaches. Concussion of the brain is a serious injury, and just what the consequences of such an injury may be are not matters of determination, but we may make the statement that concussion of the brain is an injury of such a degree that a few hundred dollars damages allowed as compensation is wholly inadequate; likewise, lacerations and scars across the face are always a continuing injury to a sensitive woman.

[5] The legal principles controlling the right of a trial court to grant a new trial on account of the inadequacy of the damages awarded are fully set forth in the case of *Peri v. Culley*, 119 Cal.App. 117, 6 P.2d 86, and the cases there cited, and we need only to call attention to the opinion in that case as determinative of every issue involved in this appeal. It is there upheld by the cases cited that unless there is a manifest abuse of legal discretion vested in the trial court, the order granting a new trial must be sustained; that the trial court has a duty of weighing the evidence, and if satisfied that the verdict is against the weight of the evidence, the verdict of the jury should be promptly set aside.

There being absolutely nothing in the record justifying the conclusion that the trial court has in any way abused its discretion, it follows that its order granting a new trial to the plaintiff in this action must be, and the same is hereby affirmed.

We concur: PULLEN, P. J., THOMPSON, J.



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